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A. J. BLEDSOE

BUSINESS LAW

FOR

BUSINESS MEN

A Reference Book Showing the Laws of California for Daily Use in Business Affairs

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EIGHTH EDITION

Revised 1909

By A. J. BLEDSOE

Member of Legislature of California from Humboldt County, Sessions of 1891, 1893, 1895

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INTRODUCTION

My experience and observation during a busy life in the practice of law have served to demonstrate to me that much vexatious and expensive controversy, arising from a lack of knowledge of the laws of the State on matters of every-day business, might be avoided, if business men had the means of ascertaining at the moment what their rights and liabilities would be.

Men usually go to a lawyer after a controversy has occurred, and seek a lawyer's advice, not to keep out of trouble, but to be extricated from it. The plan of this work is to so arrange and illustrate the laws of California pertaining to ordinary business affairs, and rights and obligations in many relations of life, that a busy man can turn immediately to the page and section and find the information he needs, before assuming a liability himself or attempting to enforce a right against others.

A. J. BLEDSOE.

WHAT SUPREME COURT JUDGES SAY

JUDGE WALTER VAN DYKE.

About a year before his death, Walter Van Dyke wrote the following letter concerning one of the earlier editions of the book:—

JUDICIAL DEPARTMENT, SUPREME COURT,
CHAMBERS OF ASSOCIATE JUSTICE WALTER VAN DYKE.
SAN FRANCISCO.

A. J. BLEDSOE, ESQ., Attorney at Law.

Dear Sir:—

I have received a copy of your book entitled "Business Law for Business Men," and you will please accept my thanks for the same. The book contains the code law of the State, conveniently arranged, bearing upon the most important subjects pertaining to business affairs, and cannot fail to be of great service to business men, for whose benefit it appears to have been specially intended, but will also prove to be very convenient and useful to the practicing lawyer.

Very truly yours,
WALTER VAN DYKE.

JUDGE F. M. ANGELLOTTI.

STATE OF CALIFORNIA,
JUDICIAL DEPARTMENT, SUPREME COURT,
CHAMBERS OF ASSOCIATE JUSTICE FRANK M. ANGELLOTTI.
SAN FRANCISCO.

A. J. BLEDSOE, ESQ.

Dear Sir:—

I appreciate your courtesy in sending me a copy of your book, "Business Law for Business Men," and the limited examination I have been able to give it satisfies me that it is a very creditable work, containing much useful information.

Yours very truly,
F. M. ANGELLOTTI.

JUDGE LUCIEN SHAW.

STATE OF CALIFORNIA,
JUDICIAL DEPARTMENT, SUPREME COURT,
CHAMBERS OF ASSOCIATE JUSTICE LUCIEN SHAW.
SAN FRANCISCO.

MR. A. J. BLEDSOE.

Dear Sir:—

I have examined your "Business Law for Business Men" with some care, and am very much pleased with it. It is concise, the style is clear, and the matter generally accurate and complete. It is the best work of the kind that I have seen.

Yours very truly,
LUCIEN SHAW.

CHIEF JUSTICE BEATTY.

STATE OF CALIFORNIA,
JUDICIAL DEPARTMENT, SUPREME COURT,
CHAMBERS OF THE CHIEF JUSTICE.
SAN FRANCISCO.

A. J. BLEDSOE, ESQ.

Dear Sir:—

At the time I received your book ("Business Law for Business Men"), and for some time after, I was too busy to examine it with any care, and only lately have done so. As the result of such examination, I am happy to say that I find it very accurate and trustworthy, and should think it would be very useful to non-professional men in ordinary matters of business.

Yours truly,
W. H. BEATTY.

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PART I

BUSINESS CONTRACTS AND LEGAL OBLIGATIONS

Making of Contracts

Section 1.—BUSINESS CONTRACTS.—By the above heading is meant the contracts and obligations which are connected directly with the usual business affairs of a community. There are many relations in life which constitute or arise out of contracts, and yet which are not connected with the ordinary business affairs of men. Such relations it is not the purpose of this book to indicate, but only the contracts, the obligations, the rights and liabilities of business men in every-day affairs, as defined by the laws of California.

Section 2.—PARTIES TO CONTRACTS.—A contract is an agreement to do or not to do a certain thing. It is essential to the existence of a contract that there should be parties capable of contracting, their consent, a lawful object, and a sufficient consideration. With reference to the parties to a contract, the law of California provides that all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights. A minor in this State cannot, under the age of 18, make a contract relating to any interest in real property, or relating to any personal property not in his immediate possession or control. But a minor may make any other contract, and it will be good, unless disaffirmed and repudiated. The contract of a minor, if made by him before he is eighteen years of age, may be disaffirmed by the minor himself,

either before his majority or within a reasonable time afterwards, or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor when he is over the age of 18, he can disaffirm it, but must restore the consideration to the party from whom it was received, or pay its equivalent. There is one exception to the law above stated: A minor cannot disaffirm a contract, because he was under age, to pay the reasonable value of things necessary for his support or the support of his family, if the contract was entered into by him when he was not under the care of a parent or guardian able to provide for him or his family.

A minor in California is a male under the age of 21 or a female under the age of 18.

A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family. Where a person is of unsound mind, and yet is not entirely without understanding, he may enter into a contract at any time before his unsoundness of mind has been judicially determined, but such contract will be voidable, subject to rescission. After his incapacity has been judicially determined, a person of unsound mind cannot make any conveyance or other contract, until a court has decided that his reason is restored.

A person deprived of civil rights is not capable of making a contract while in that condition. A person is deprived of civil rights when he is sentenced to imprisonment in the State Prison for life, and his civil rights are suspended during the term when he is sentenced for a term less than life. A convict may, however, make and acknowledge a sale and conveyance of property.

With the exceptions above stated, all persons in California are capable of being parties to contracts.

Civil Code, Sections 33, 34, 38, 39, 40, 1556; Penal Code, Sections 673, 674, 675.

Section 3. — CONSENT OF PARTIES TO CONTRACT.—To constitute a valid contract, the consent of the parties to it must be freely given, and there must be a mutual consent, and their consent to the agreement must be communicated by each to the other. The laws of California but follow the principles of natural justice when they provide that, when the consent of a party to a contract is not given freely and voluntarily, but is obtained by fraudulent acts or misrepresentations, the contract cannot stand, and will be set aside by the courts whenever the facts are proved. Some of the facts which will render a contract invalid, by reason of insufficient consent of the parties, are where the consent of any party has been obtained by imprisonment of the person, or unlawful detention of his property, or threats to injure his person, property, or character, or deceiving him by misrepresenting or concealing the truth, or by making a promise without any intention of performing it. Whenever any of these facts appear, to the injury of a party, the courts of California will set aside the contract. Also, a contract will be set aside, because free consent was not given, whenever one party in whom another has confidence uses that confidence for the purpose of taking an unfair advantage over the latter, or whenever one party takes an unfair advantage of another's weakness of mind, or whenever one party takes a grossly oppressive and unfair advantage of another's necessities or distress. Also, consent will not be considered mutual and free, whenever a mistake is made in entering into a contract, where either party, without negligence on his part, acts under an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or acts in the belief that a thing material to the contract exists or has existed when in fact the thing does not exist and never did exist. Also, a contract will be set aside whenever all the parties act under a misapprehension of the law, all supposing that they know and understand it; also, because of misapprehension of the law

by one party to a contract, of which the other party is aware at the time of contracting, but which he does not rectify.

Civil Code, Sections 1565, 1567, 1569, 1570, 1572, 1575, 1577, 1578.

Section 4.—WHEN CONSENT IS NOT MUTUAL.—Consent of the parties is not mutual unless the parties all agree upon the same thing in the same sense.

Civil Code, Section 1580.

Section 5.—PROPOSAL OF CONTRACT, ACCEPTANCE, AND REVOCATION.—One party may propose a thing, but the proposal must be accepted before a contract is created. An acceptance must be absolute and unqualified. If one party makes a proposition, and the other replies with a proposition on his part, there is no contract, because the parties have not mutually agreed upon anything. The proposal may be revoked at any time before it is accepted. It is revoked by giving notice of its withdrawal to the person to whom the proposal was made. It is also revoked, where a certain time was given in which to accept, by the expiration of that time without notice of acceptance; it is also revoked by the failure of the person to whom the proposal is made to do some act which is required of him as a condition preceding the acceptance; and a proposal is necessarily considered revoked by the death or insanity of the proposer. Any usual and reasonable mode of giving notice of acceptance of a proposal may be adopted, as, by mail, or in person, or by messenger, and it will be sufficient to constitute a contract. But the proposer may prescribe a certain mode in which notice of acceptance must be given, and the proposer will not be bound unless the mode prescribed by him is adopted.

Civil Code, Sections 1582, 1583, 1585, 1586, 1587.

Section 6.—OBJECTS OF CONTRACT.—The object of a contract must be lawful when the contract is made, and possible of performance, and certain in its terms. However, the law considers everything possible except that which is impossible in the nature of things, and, therefore, to render a contract invalid for impossibility of performance, it must be apparent from the nature of the thing agreed upon that it will not be possible to perform it. Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void. But where a contract has several distinct objects, of which one at least is lawful, in whole or in part, the contract is void as to the unlawful object, and valid as to the rest.

Civil Code, Sections 1595, 1596, 1597, 1598, 1599.

Section 7.—CONSIDERATION OF A CONTRACT.—The consideration of a contract need not necessarily be money. Of course, the consideration must be lawful, that is, it must not be contrary to any express provision of law, or against the policy of express law, or contrary to good morals. But the consideration may consist in any benefit conferred or agreed to be conferred upon the promisor by any other person, to which the promisor is not already lawfully entitled, or in any prejudice suffered or agreed to be suffered by the person to whom the promise is made, which he is not already lawfully bound to suffer. The abandonment of a right, or forbearing to enforce a claim, or any detriment suffered by the promisee, will constitute sufficient consideration for a contract, and be as binding as though the payment of money were agreed upon.

Civil Code, Sections 1605, 1607, 1667.

Section 8.—WHAT CONTRACTS MAY BE VERBAL.—All contracts may be entered into verbally, except such as are specially required by law to be in writing. If the

contract is one which the law does not specially require to be in writing, the verbal agreement of the parties is as good as any other, and as binding as it would be if reduced to writing.

Section 9.—WHAT CONTRACTS MUST BE IN WRITING.—The law of California provides that the following contracts are invalid, unless the contract, or some note or memorandum describing its terms, is put into writing and subscribed by the party to be charged, or by his agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof; (2) A special promise to answer for the debt, default, or miscarriage of another; but there is one exception to this provision, where it appears that the promise was such as the law considers an original obligation on the part of the promisor; (3) An agreement made upon consideration of marriage, other than a mutual promise to marry; (4) An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accepts or receives part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but, when a sale is made at auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum; (5) An agreement for the leasing for a longer period than one year, or for the sale of real property, or for an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, and subscribed by the party sought to be charged; (6) An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission; (7) An agreement which by its terms is not to be performed during the lifetime of the promisor.

or an agreement to devise or bequeath any property, or to make any provision for any person by will.

Civil Code, Section 1624 (as amended in 1905).

Section 10.—CONTRACTS AGAINST PUBLIC POLICY.—There are certain contracts which the law says are against public policy, and therefore invalid. Generally any contract which has for its object the violation of any law of the land would be illegal, without reference to the question of public policy. But the State recognizes the usual and natural distinctions between morality and immorality, that which is inherently right and that which is inherently wrong, and forbids, on the ground of public policy, certain contracts which may not be forbidden by the statutes. Therefore it is said that all contracts in violation of morality are void; that agreements to do acts forbidden by the law of God, or which are manifestly in furtherance of immorality, and tend to contaminate the public mind, can not be enforced in the courts of this State. Some illustrations of this rule are, where lodgings are leased for purposes of prostitution; where a contract is made for the printing or sale of obscene or libelous books; so, also, contracts to prevent competition at an auction sale, contracts in restraint of trade, contracts in restraint of marriage, marriage brokerage contracts, wagers, and gambling contracts; all of these, or others of like character, are opposed to good morals, and are void, whether expressly prohibited by statute or not.

Section 11.—CONTRACTS IN RESTRAINT OF TRADE.—Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void. The courts have found great difficulty, however, in determining what are contracts in restraint of trade, within the meaning of the law. It is the public policy to encourage trade and traffic, and any contract which would have the effect of depriving the

public of the advantages of competition in trade is void, as opposed to public policy. Thus, where all, or nearly all, of an article of trade or commerce within a community or district is brought within the hands of one man or set of men, so as to practically bring the handling or production of the commodity within such single control, to the exclusion of competition or free traffic therein, this constitutes a monopoly, and is in restraint of trade. Reasonable combinations to regulate prices are valid. But if one agrees with another that he will never again at any time or place work at his trade, or carry on his business, or exercise his profession, such a contract, being without limitation as to time or place, is considered to be in restraint of trade, and is void.

Civil Code, Section 1673.

Section 12.—SALE OF GOOD WILL OF A BUSINESS.—The sale of the good will of a business forms an exception to the law stated in the last Section. One who sells the good will of a business may agree with the buyer that he will not carry on a similar business within a specified county or city, so long as the buyer, or any person to whom the buyer shall dispose of the good will, carries on a like business at the same place. There is an exception, also, in the case of partners. Partners may, upon a dissolution of the partnership, make a valid contract that none of them will carry on a similar business within the whole or a part of the same city or town where the partnership business has been transacted.

Civil Code, Sections 1674, 1675.

Section 13.—ALTERATION OF VERBAL CONTRACT.—Contracts, verbal or written, may be subsequently altered, so as to make the terms or conditions different from what they were at first. But where the contract was verbal only, the law provides that the consent of the parties to its alteration in any respect must be ex-

pressed in writing, and where the consent to the alteration is thus given and made, in writing, it does not require a new consideration.

Civil Code, Section 1697.

Section 14.—ALTERATION OF WRITTEN CONTRACT.—A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise. The executed oral agreement, which will be sufficient to alter a previous written contract, must consist in the doing or the suffering of something not required to be done or suffered by the terms of the writing. So, if the parties verbally agree upon the doing of something, which one or the other would be bound to do in the proper fulfilment of the written contract, this does not constitute an executed oral agreement to alter the previous writing.

Civil Code, Section 1698.

Section 15.—EXPRESS CONTRACTS. — An express contract is one the terms of which are stated in words, from which words, used in a writing or orally between the parties, the agreement between the parties is ascertained.

Section 16.—IMPLIED CONTRACTS.—An implied contract is one the existence and terms of which are manifested by the conduct of the parties. The conduct of the parties toward each other, the circumstances surrounding the transaction, may be such that the law will imply that certain agreements were entered into, although no evidence other than such circumstances or conduct may exist as proof of the contracts. The law will imply that a party did make such a stipulation as, under the circumstances disclosed, he ought, upon the principles of honesty, justice, and fairness, to have made. Thus, if one party accepts the services of another, or receives his goods, having reaped the benefit of such services or goods, the law implies a promise on his part to pay for them.

Civil Code, Section 1621.

Section 17. — TERMINATION OF CONTRACTS. — A contract is terminated, of course, when it has been fully performed, but it may also be rescinded or canceled under certain circumstances.

Section 18.—RESCISSION OF CONTRACT.—A party to a contract may rescind it, if his consent to it, or the consent of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence on the part of the party as to whom he rescinds, or on the part of any other party to the contract jointly interested with the latter. A party to a contract may also rescind it if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part; or if the consideration becomes entirely void, for any cause; or if the consideration, before it is rendered to him, fails in a material respect, from any cause. A party to a contract may also rescind it by consent of all the other parties.

Civil Code, Section 1689.

Section 19. — EXTINCTION OF WRITTEN CONTRACT BY CANCELLATION.—The destruction or cancellation of a written contract, or of the signature of the parties, with the intent to extinguish the obligation, does extinguish it as to all the parties consenting to the act. But where a contract is executed in duplicate, the destruction of one copy, while the other exists, will not have the effect of extinguishing the contract.

Civil Code, Sections 1699, 1701.

Section 20.—INTERPRETATION OF CONTRACTS. —The essential thing in the interpretation of a contract, in ascertaining what is meant by it, is to find the intention of the parties. The law of California provides that a contract must be so interpreted as to give effect to the mutual intention of the parties at the time of contracting, so far as that intention is ascertainable and lawful. The language

of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity. When a contract has been reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, oral evidence will be received in the courts to show what the intention of the parties really was, and, when ascertained, the real intention will govern, and the erroneous parts of the writing will be disregarded. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable. The whole contract is to be considered, in arriving at the intention of the parties. A contract must be given such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if this can be done without a violation of the intention of the parties. Words used in a contract are to be understood in their ordinary and popular sense, unless used by the parties in a technical sense, or unless a special meaning is given to the words by usage or custom. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. However broad may be the terms of a contract, it extends only to those things which it appears the parties really intended to include in it.

Civil Code, Sections 1636, 1638, 1639, 1640, 1641, 1643, 1644, 1647, 1648.

Section 21.—PRINTED AND WRITTEN PARTS OF CONTRACT.—Where a contract is partly written and partly printed, the written parts control the printed parts.

Civil Code, Section 1651.

Section 22.—TIME OF PERFORMANCE OF CONTRACT.—If the time is specified in the contract for its performance, the stipulation of the parties will control. If no time is specified, the law allows a reasonable time.

What is a reasonable time for the performance of a contract depends upon the circumstances and the nature of the thing to be done.

Section 22a.—PLACE OF PERFORMANCE.—A contract is supposed to be made at some place, and the place where it becomes complete is the place where it is made. If a contract is made by exchange of letters, or telegrams, it is held to have been made at the place where the letter is mailed or telegram filed, containing an unconditional acceptance by one party of the offer of the other. If the communications are oral, either with or without telephone, between parties on opposite sides of a county line, the law deems the contract to have been made in the county where the offer of one is accepted by the other. (Decided by the Supreme Court of California, in the case of Bank of Yolo vs. The Sperry Flour Company, which decision is printed in Volume XXVI, California Decisions, page 936.)

Section 22b.—THE CARTWRIGHT LAW.—(a)—The Terms of the Law.—The law provides:—

"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either, any or all of the following purposes:—

"1. To create or carry out restrictions in trade or commerce.

"2. To limit or reduce the production, or increase the price of merchandise or of any commodity.

"3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"4. To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void."

The remainder of the act is taken up with provisions for punishment of those who violate the law. It is made the duty of the attorney-general to bring suit for a forfeiture of the charter of any corporation violating the law, and to enjoin any foreign corporation from further doing business in this state; any person guilty of violating the law is punishable by a fine of not less than fifty dollars nor more than five thousand dollars, or by imprisonment not less than six months nor more than one year, or both such fine and imprisonment; and each day's violation of the provisions of the act constitutes a separate offense. For each day's violation of the law, in any particular, the guilty person, firm, or corporation forfeits fifty dollars, the payment of which may be compelled by the attorney-general or the district attorney. Any person injured in his business or property by a violation of the law, may sue for damages,

and when his damages are ascertained, may be given judgment for double the amount.

(b) **Construction and Effect of the Law.**—It seems to me, from the letters and inquiries I have received, that there is a very general misunderstanding of the effect of the law, and of the construction which the courts will give it whenever it is tested in a proper way. In my opinion, the supreme court will not give this law the extreme and far-reaching effect which many business men have been led to believe was intended. The impression prevails among many that under the terms of this law a manufacturer cannot fix a price at which his goods must be sold; that a wholesaler cannot regulate the retail price of any article distributed by him, although thousands of dollars and years of effort may have been expended in establishing the reputation and demand which made his trademark valuable; that any article of trade or commerce must henceforth, on penalty of violating this law, be subject to the ruinous influences of retailers who may cut prices below cost in order to get or retain trade; and that a producer, manufacturer, or wholesaler cannot refuse to sell his product or goods to any person, no matter what sacrifice or loss may follow. In my opinion, such construction of the law would be unreasonable, and the supreme court of California will not give it any such effect. It is a general rule that courts will give to a law only a reasonable interpretation, and one that will do justice to all.

I do not see any difficulty in interpreting this law in a reasonable way. The intention of the law is evident on its face. It was intended to prohibit combinations of persons, firms, partnerships, corporations or associations by which trade or commerce shall be restrained or production limited, or competition prevented, or the price fixed of an article of merchandise or produce, to the injury of the public at large. If all the manufacturers of salt, or flour, for instance, should enter into a combination and arbitrarily fix the selling price, so as to deprive the public of

the advantages of competition, this would be in restraint of trade, and a violation of the law. Or, if all the manufacturers of lumber in California should enter into an agreement that they would shut down their mills for six months in the year, and thus bring up the price of lumber to a figure which would be oppressive and ruinous to the public in its effect upon building operations, this would be a violation of the intent and spirit of the law. But the law does not intend, nor would the legislature have the power to enact, that a person can no longer do with his own property as he pleases. Notwithstanding the Cartwright Law, the manufacturer may still prescribe the price at which his own brand of a particular commodity shall be sold, the wholesaler may still protect the standing and trademark of any particular article distributed by him by fixing the retail price, the producer may still fix the price of his own product, and any owner of property may still have the right to select his own customers.

(c) **Amendments of 1909.** — The Legislature of 1909 adopted an amendment to the Cartwright law, providing "that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed; provided, further, that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms or corporations, engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation, having as its object or purpose the transportation, marketing or delivery of such commodities."

Two new sections were also added to the Cartwright law, reading as follows: "It shall be lawful to enter into agreements or form associations or combinations, the purpose and effect of which shall be to promote, encourage or

increase competition in any trade or industry, or which are in furtherance of trade." "Labor, whether skilled or unskilled, is not a commodity within the meaning of this Act."

Act of the Legislature, 1909, approved March 20, 1909.

Agreements for Sale

Section 23.—KINDS OF AGREEMENTS FOR SALE.—An agreement for sale is either (1) an agreement to sell, (2) an agreement to buy, or (3) a mutual agreement to sell and buy. The difference between a sale and an agreement for sale is, that in a sale the subject of the contract becomes the property of the buyer as soon as the contract is concluded, while in an agreement for sale the title to the property remains in the vendor until the contract is executed. An agreement to buy is a contract by which one engages to accept from another and pay a price for the title to a certain thing. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing. An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor. Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether the property itself is then in existence or not.

Civil Code, Sections 1726, 1727, 1728, 1729, 1730.

Section 24.—AGREEMENT TO SELL REAL PROPERTY.—An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property. No agreement for the sale of real property, or any interest in real property, is valid, unless the agreement, or some note or memorandum of its terms, be in writing and subscribed by the party to be charged or his agent. If the agreement, or the note or memorandum of it, is subscribed by the agent of the party, it is necessary

to the validity of the instrument that the agent's authority from his principal shall be in writing, also.

Civil Code, Sections 1731, 1741.

Section 24½.—FORM OF AGREEMENT TO SELL REAL PROPERTY.—Agreements to sell real property are usually prepared in the form of a bond for a deed. The following form will be sufficient under the laws of California:

AGREEMENT FOR SALE OF REAL ESTATE.—This Agreement, made and entered into the ..... day of ....., 190.., between ....., of the County of ....., State of California, the party of the first part, and ..... of the same place, the party of the second part, witnesseth:

That the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and said second party agrees to buy, all those certain lots or parcels of land, situate in the County of....., State of California, bounded and described as follows, to-wit: .....

(Here insert description of property.)

for the sum of ..... Dollars, lawful money of the United States; and the said party of the second part, in consideration of the premises, agrees to pay to the said party of the first part, the said sum of ..... Dollars, in gold coin of the United States, at the times and in the amounts as follows, to-wit:.....

(Here insert terms of payments agreed upon.)

It is agreed that all deferred payments shall bear interest at the rate of ..... per cent per annum, payable semi-annually.

And the said party of the second part agrees to pay all State, City, and County taxes, or assessments of whatsoever nature, which are or may become due on the premises above described.

In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligation in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto.

Time is of the essence of this contract.

And the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed to the premises herein described, free and clear of encumbrances.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the day and year first above written.

.....(Seal.)

.....(Seal.)

(If the above agreement is intended to be recorded, it must be acknowledged.)

Section 25.—AGREEMENT TO SELL PERSONAL PROPERTY.—If an agreement is made to buy or sell personal property, and the price is two hundred dollars or over, the agreement is not valid unless the agreement itself, or some note or memorandum giving its terms, is in writing, and subscribed by the party to be charged or his agent. There is an exception to the law, which is where an agreement is made to manufacture a thing, from materials to be furnished by the manufacturer or another person.

Civil Code, Sections 1739, 1740.

Section 25½.—FORM OF AGREEMENT TO SELL PERSONAL PROPERTY.—The following is a sufficient form of agreement to sell personal property:

AGREEMENT FOR SALE OF PERSONAL PROPERTY.—This Agreement, made the ..... day of ....., 19.., between ...., of the County of ..... State of California, the party of the first part, and.....

....., of the same place, the party of the second part, witnesseth:

That the said ....., the party of the first part, for the consideration hereinafter mentioned, agrees to sell to the said ...., the party of the second part, the following-described personal property, situate in the County of ....., State of California, to-wit: .....

.....

(Here describe the property.)

.....

said property to be delivered to said party of the second part, at ....., on or before the ..... day of ....., 19..

In consideration whereof, the said ...., the party of the second part, agrees to pay to the party of the first part the sum of ..... Dollars, gold coin of the United States, on the said ..... day of..... ....., 19.., or sooner on the delivery of said property as aforesaid.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the day and year first above written.

.....(Seal.)

.....(Seal.)

(If agreement is to be recorded, it must be acknowledged.)

Sale of Personal Property

Section 26.—WHEN GOODS SOLD MUST BE DELIVERED.—One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand. This rule will not apply in some cases, however, where the seller has a lien on the property. Until the seller does put the goods into a condition fit for delivery, the title does not pass. Title does not pass when the property sold has not been identified, nor when something remains to be done for the purpose of ascertaining the price, as by weighing, measuring,

or testing the goods, where the price is to depend upon the quantity or quality of the goods. The property must be delivered within a reasonable time after demand. What is a reasonable time depends upon all the circumstances of the particular transaction.

Civil Code, Section 1753.

Section 27.—WHERE DELIVERY MUST BE MADE.—In the absence of an agreement to the contrary, the place where the property is at the time of the agreement of sale is the place of delivery; or if the article is not then in existence, it is deliverable at the place where it is manufactured or produced.

Civil Code, Section 1754.

Section 28.—WHEN PRICE OF GOODS BOUGHT MUST BE PAID.—Unless by agreement the price is stipulated to be paid at a different time, the law is that the buyer must pay the price of the thing sold on its delivery, and must take it away within a reasonable time after the seller offers to deliver it. Of course, the buyer and seller may agree upon any terms of payment, contrary to the provisions of the law stated above. After personal property has been sold, and until the delivery is completed, the seller must keep the property without charge until the buyer has had a reasonable opportunity to remove it.

Section 29.—RIGHT TO INSPECT GOODS BEFORE ACCEPTANCE.—On an agreement for sale with warranty the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it, and if the seller refuse to permit the buyer to make a reasonable inspection of the thing sold, in a proper manner and at a proper time, the buyer may rescind the contract and refuse to take the goods.

Civil Code, Section 1785.

Section 30.—EXPENSE OF TRANSPORTATION.—One who sells personal property must bring it to his own

door, or to some other convenient place, for its acceptance by the buyer, but further transportation is at the risk and expense of the buyer.

Civil Code, Section 1755.

Section 31.—BUYER'S DIRECTIONS AS TO MANNER OF SENDING THINGS SOLD.—If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. Therefore, if the buyer directs that the goods be shipped by a certain line or lines of carriers, the seller, if he desires to avoid the risk of transportation, must obey the buyer's directions. If he follows such directions, the transportation is at the risk of the buyer. Also, if there are no special directions by the buyer as to the manner of shipment, and the seller uses ordinary care in forwarding the goods, the transportation is at the buyer's own risk.

Civil Code, Section 1757.

Section 31a.—THE BULK LAW.—The Legislature of 1903 passed an Act, approved by the Governor, March 10, 1903, intended to prevent the fraudulent sale of a stock in trade. This law provides that the sale, transfer, or assignment of a stock in trade (or of such a quantity of a stock in trade as to be substantially the whole thereof), in bulk, is to be conclusively presumed fraudulent and void, as against the existing creditors of the vendor, unless notice is first given by the vendor. The notice must be in writing, and must be recorded in the county where the stock of goods is located, at least five days prior to the sale or transfer. If the stock is located in two or more counties, the notice must be recorded in each county; for instance, if the vendor has a store in Sonoma County and a store in Mendocino County, and intends to sell or transfer the stock in both, he must file his notice in the office of the County Recorder in each county. The required notice must, to be legal, be in writing,

and must state the name and address of the vendor, transferrer, or assignor; the name and address of the intended vendee, transferee, or assignee; a general statement of the character of the property or merchandise intended to be sold, transferred, or assigned; the time and place of the payment of the purchase price agreed upon; or, if the intended sale is to be at public auction, the notice must state that fact in addition, with the time, terms, and place of such sale. The sale shall in no event occur within five days of the date when the notice is recorded. The above law does not apply to the sale of goods in the ordinary course of trade and in the usual method of business. It is intended only to protect the wholesaler against the sale or transfer or assignment by the retailer of his stock of goods before they are paid for by him. The effect of the law is this: If a stock is sold without the notice, the wholesaler can follow the goods, and recover from the vendee whatever damages he has sustained by reason of the fraudulent sale, transfer, or assignment; and if the notice is given, the wholesaler will have an opportunity to protect himself by suit and attachment of the property within the five days. The law does not apply to a case where the debtor makes an assignment of the property for the benefit of creditors generally, nor does it apply to any sale, transfer, or assignment of any property which is by law exempt from execution. For a list of property exempt from execution, see under the head of "Attachments."

Statutes of 1903, p. 111.

Section 31b.—BILL OF SALE.—A bill of sale need not be in any particular form to be valid. It is not essential to its validity that it be recorded, although it may be for the best interests of all parties that it should be filed for record. A bill of sale is not required to be acknowledged, if it is not to be recorded; but it must be acknowledged, if it is to be recorded.

Section 31c.—FORM OF BILL OF SALE.—The following is a form of bill of sale:—

KNOW ALL MEN BY THESE PRESENTS, That I, ..., of the County of ....., State of California, the party of the first part, for and in consideration of the sum of ..... Dollars, Gold Coin of the United States of America, to me in hand paid by ....., of ....., the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto the said party of the second part, his executors, administrators, and assigns, the following described personal property: .....

(Here describe property sold.)

.....

To have and to hold the same to the said party of the second part, his executors, administrators, and assigns forever. And I do for myself, my heirs, executors, and administrators, covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made, unto the said party of the second part, his executors, administrators, and assigns, against all and every person and persons, whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the ..... day of ....., 190...

.....(Seal.)

Section 31d.—ADULTERATED, MISLABELED OR MISBRANDED FOODS AND LIQUORS.—It is unlawful to brand or label an imitation under the distinctive name of another article of food; or, to label, brand, or color, so as to deceive or mislead a purchaser; or, to put up a domestic product and label it as a foreign product; or, to fail to state on packages the weight or measure, plainly and correctly, when goods are so put up or offered for sale; or, if the label on package goods contains a false or misleading statement regarding the ingredients or the substance contained there-

in; or, if the goods put up are an imitation or adulteration, or offered for sale under a false name or designation.

Act of the Legislature, approved February 22d, 1909.

Section 31e.—COLD STORAGE EGGS AND POULTRY.—In case of eggs and poultry, if they have been kept or packed in cold storage, or otherwise preserved, they must be so indicated by written or printed label or placard, plainly designating such fact, when offered or exposed for sale.

Act of the Legislature, approved February 22d, 1909.

Section 31f.—SANITARY REGULATION OF FOOD PRODUCING ESTABLISHMENTS.—The Legislature of 1909 passed a stringent law regulating the sanitary condition and operation of food producing establishments. The law provides as follows:

"Every building, room, basement or cellar, occupied, or used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, restaurant, hotel, grocery, meat market, or other place or apartment, used for the production, preparation for sale, manufacture, packing, storage, sale or distribution of any food, shall be properly lighted, drained, plumbed and ventilated, and conducted with strict regard to the influence of such conditions upon the health of the operatives, employees, clerks or other persons therein employed, and the purity and wholesomeness of the food therein produced, kept, handled or sold; and for the purpose of this act the term "food" shall include all articles used for food, drink, confectionery or condiment, whether simple or compound, and all substances and ingredients used in the preparation thereof.

"The floors, sidewalls, ceilings, furniture, receptacles, utensils, implements and machinery of every establishment or place where food is manufactured, packed, stored, sold or distributed, shall at no time be kept in an unclean, unhealthful or unsanitary condition; and for the purposes of this act, unclean, unhealthful and unsanitary conditions shall be deemed to exist if food in the process of manufacture,

preparation, packing, storing, sale or distribution is not securely protected from flies, dust, dirt, unsanitary conditions, and as far as may be necessary, by all reasonable means from all other foreign or injurious contamination; and if the refuse, dirt, and the waste products subject to decomposition and fermentation incident to the manufacture, preparation, packing, storing, selling and distributing of food, are not removed daily; and if all trucks, trays, boxes, baskets, buckets, and other receptacles, chutes, platforms, racks, tables, shelves, and all knives, saws, cleavers, and all other utensils, receptacles, and machinery, used in moving, handling, cutting, chopping, mixing, canning, and all other processes used in the preparation of food, are not thoroughly cleaned daily; and if the clothing of operatives, employees, clerks, and other persons therein employed, is unclean, or if they dress or undress, or leave or store their clothing therein.

"The side walls and ceilings of every bakery, confectionery, hotel and restaurant kitchen, shall be well plastered, or ceiled, with metal or lumber, or shall be oil painted or kept well lime washed, or otherwise kept in good sanitary condition; and all interior woodwork of every bakery, confectionery, hotel and restaurant kitchen, shall be kept well oiled or painted with oil paint, and be kept washed clean with soap and water or otherwise kept in a good sanitary condition; and every building, room, basement or cellar, occupied or used for the preparation, manufacture, packing, storage, sale or distribution of food, shall have an impermeable floor, made of cement or tile laid in cement, brick, wood or other suitable, non-absorbent material which can be flushed and washed clean with water.

"The doors, windows and other openings of every food producing or distributing establishment, where practicable, shall be fitted with stationary or self-closing screen doors and wire window screens, of not coarser than fourteen mesh wire gauze.

"Every building, room, basement or cellar, occupied or used for the preparation, manufacture, packing, canning,

sale or distribution of food, shall have convenient toilet or toilet rooms, separate and apart from the room or rooms where the process of production, manufacture, packing, canning, selling or distributing, is conducted. The floors of such toilet rooms shall be of cement, tile laid in cement, wood, brick or other non-absorbent material, and shall be washed and scoured daily. Such toilets shall be furnished with separate ventilating pipes or flues, discharging into soil pipes, or on the outside of the building in which they are situated. Lavatories and washrooms shall be adjacent to toilet rooms, and shall be supplied with soap, running water and towels, and shall be maintained in a clean and sanitary condition. Operatives, employees, clerks and all persons who handle the material from which food is prepared, or the finished product, before beginning work and immediately after visiting a toilet or lavatory shall wash their hands and arms thoroughly in clean water.

"Cuspidors, for the use of operatives, employees, clerks and other persons, shall be provided, and each cuspidor shall be emptied and washed out daily with disinfectant solution, and not less than five ounces of such solution shall be left in each cuspidor while in use. No operative, employee, clerk or other person, shall expectorate or discharge any substance from his nose or mouth, on the floor or interior side wall of any building, room, basement, or cellar where the production, manufacture, packing, storing, preparation or sale of any food product is conducted.

"No person shall be allowed to, nor shall he, reside or sleep in any room of a bake shop, public dining-room, hotel or restaurant kitchen, confectionery, or other place where food is prepared, produced, manufactured, served or sold.

"No employer shall require, permit or suffer any person to work, nor shall any person work, in a building, room, basement, cellar, place or vehicle, occupied or used for the production, preparation, manufacture, packing, storage, sale, distribution or transportation of food, who is afflicted or affected with any venereal disease, small pox, diphtheria,

scarlet fever, yellow fever, tuberculosis, consumption, bubonic plague, Asiatic cholera, leprosy, trachoma, typhoid fever, epidemic dysentery, measles, mumps, German measles, whooping-cough, chicken pox, or any other infectious or contagious disease.

"The members of the State Board of Health, inspectors and agents, appointed by said board, and all local health officers and inspectors, shall have full power at all times to enter every building, room, basement, cellar, or any place occupied or used, or suspected of being occupied or used, for the production, manufacture, preparation, storage, sale or distribution of food, and to inspect the premises and all utensils, implements, receptacles, fixtures, furniture and machinery used as aforesaid, and if, upon inspection, any such building, room, basement, cellar, or any such place, vehicle, employer, operative, employee, clerk, driver, or other person, is found to be in violation or violating any of the provisions of this act, or if the production, preparation, manufacture, packing, storing, sale or distribution of food is being conducted in a manner detrimental to the health of the employees or operatives or to the character or quality of the food therein being produced, manufactured, packed, stored, sold, distributed or conveyed, the officer or inspector making the examination shall at once make a written report of the same to the District Attorney of the county, who shall prosecute all persons violating any of the provisions of this act, and also to the State Board of Health. The State Board of Health, from time to time, as in its discretion it may determine, may publish such reports in its monthly bulletin.

"All buildings, rooms, basements, cellars, and other places and things, kept, maintained, or operated, or which are, in violation of the provisions of this act or any of them, and all food produced, prepared, manufactured, packed, stored, kept, sold, distributed or transported, in violation of the provisions of this act or any of them, are hereby declared to be public nuisances, dangerous to health. Such nuisances may be abated or enjoined, in an action brought for that purpose

by the local or State Board of Health, or they may be summarily abated in the manner provided by law for the summary abatement of public nuisances dangerous to health.

"Any person, firm or corporation, whether as principal or agent, employer or employé, who violates any of the provisions of this act shall be guilty of a misdemeanor, and each day that conditions or actions, in violation of this act, shall continue, shall be deemed to be a separate and distinct offense, and for each offense, upon conviction, he shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or shall be imprisoned in the county jail for a term not exceeding six months, or by both such fine and imprisonment."

Act of the Legislature, approved March 6th, 1909.

Section 31g.—POISONOUS CONFECTIONERY.—It is unlawful to manufacture or offer for sale any confectionery containing terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

Act of the Legislature, approved March 13th, 1909.

Section 31h. — MANUFACTURE OR SALE OF STUFFED FURNITURE.—All persons manufacturing in this State, in whole or in part, any article of hotel, boarding house, lodging house or domestic or office furniture, or beds or mattresses, or cushions, used or intended to be or that could be used by human beings, that are stuffed or made in whole or in part, with material composed in whole or in part from secondhand or cast off clothing, rags, or secondhand, or cast off material of any character whatever, or with shoddy, must at the time of the completion of such manufacture attach to a conspicuous place upon each of such articles so manufactured by him, a label or stamp showing the correct character of the materials with which the cushion portion of such articles of furniture or beds or cushions or mattresses are stuffed; and no person so manufacturing any such

articles shall allow the same or any thereof to leave his possession in the course of trade or business unless such label or stamp is so affixed; and no person shall sell, or offer for sale, in this State any of such articles of furniture, or beds, or mattresses, or cushions, whether the same are manufactured in this State or not, unless such a label or stamp is so affixed.

Any person violating any of the provisions of this law will be guilty of a misdemeanor, and upon conviction may be punished by a fine of not less than fifty, nor more than five hundred dollars, or imprisoned not more than six months, or by both such fine and imprisonment.

Act of the Legislature, approved March 18th, 1909.

Section 31i. — ADULTERATION OF DAIRY PRODUCTS.—It is unlawful to sell or offer for sale any adulterated milk or other dairy products. To remove all doubt as to what is meant by the term "adulteration," the Legislature has prescribed the following definitions:

Milk and the products of milk shall be deemed adulterated if it or they shall not conform with the following definitions and standards:

1. Milk is the fresh, clean, lacteal secretion obtained by the complete milking of one or more healthy cows, properly fed and kept, excluding that obtained within fifteen (15) days before and five (5) days after calving, and contains not less than three (3.0) per cent of milk fat, and not less than eight and five-tenths (8.5) per cent of solids—not fat, and from which no cream or fat or other solid component has been removed.

2. Skim milk is milk from which a part or all of the cream has been removed and contains not less than nine and twenty-five hundredths (9.25) per cent of milk solids.

3. Condensed milk or evaporated milk is whole milk from which a considerable portion of water has been evaporated and contains not less than twenty-four and five-tenths (24.5) per cent of milk solids, including not less than seven and seven-tenths (7.7) per cent milk fat.

4. Sweetened condensed milk is whole milk from which a considerable portion of water has been evaporated and to which sugar (sucrose) has been added, and contains not less than twenty-four and five-tenths (24.5) per cent of milk solids, including not less than seven and seven-tenths (7.7) per cent milk fat.

5. Condensed skim milk is skim milk from which a considerable portion of water has been evaporated.

6. Cream is that portion of milk, rich in milk fat, which rises to the surface of milk on standing, or is separated from it by centrifugal force, is fresh and clean, and contains not less than eighteen (18) per cent of milk fat.

7. Evaporated cream, clotted cream, is cream from which a considerable portion of water has been evaporated.

8. Milk fat, butter fat, is the fat of milk and has a Reichert-Meissel number not less than .905 (40 degrees C.).

9. Butter is the clean, non-rancid product made by gathering in any manner the fat or fresh or ripened milk or cream into a mass, which also contains a small portion of the other milk constituents, with or without salt, and contains not less than 80 per cent of milk fat.

Act of the Legislature, approved April 22d, 1909.

Section 31j.—FALSE ADVERTISEMENTS.—It is a misdemeanor to publish false advertisements in newspapers, concerning the quantity, quality, value, price, or the method of production or manufacture, of any merchandise in this State.

Act of the Legislature, approved April 22d, 1909.

Installment Sales of Personal Property

Section 31k. — CONDITIONAL SALES OF PERSONAL PROPERTY.—Where personal property is delivered, under a contract for payments on installments, title to remain in the vendor until final payment, it is a conditional sale. The title to the property does not pass from the vendor, nor vest in the vendee, until the contract is completed upon the payment of the last installment.

Section 31l.—LANGUAGE OF THE CONTRACT.—It makes no difference what language is used in the contract, if the intention of the parties is to be seen, that the vendor retains the title until the money is paid. The paper may be called a "deed," or "agreement," or "lease," and the designation will not affect the real meaning of the contract. It is only a conditional sale, no more, no less, whatever the language used in the contract may be. In the case of Lundy Furniture Company vs. White, our Supreme Court said, "Where goods were delivered under a contract, designated as a lease, providing for a monthly rental, and that the consent of the seller should be necessary for removal of the goods from the purchaser's residence, and reserving title in the seller until full payment, after which a bill of sale was to be given, the transaction was a conditional sale, and the title remained in the seller. The name by which the parties designate their contract is not determinative of its nature. The calling of this agreement a 'lease' did not make it such. The payments, to be made monthly in installments, designated 'rent,' were in fact nothing but partial payments." (Decided by the Supreme Court of California, in the case of Lundy Furniture Company vs. White, which decision is printed in Volume 126 of the California Reports, page 170.)

Section 31m.—DEFAULT IN PAYMENTS.—It is the duty of the vendee to make payments of the installments when due. He has no right, after he has received the property, to change or alter in any way the terms of payments. If he does not pay when due, this will amount to a default on his part, and a breach of the contract, for which the vendor may take immediate action.

Section 31n.—SALE BY VENDEE TO ANOTHER PERSON.—The party receiving the property has no right to sell it until the purchase price is paid. If the vendee sells the property, the purchaser from him obtains no title, and the original vendor may recover the property. The

second vendee is not entitled to stand in any better situation than his vendor in regard to the title of the property. And where the owner of a piano sold it on the installment plan, with the condition that the title should remain in the seller until final payment, and the vendee sold the piano before payment of the final installment, the Supreme Court held that the purchaser from him got no title, and the true owner was entitled to recover his property. (Decided by the Supreme Court of California in the case of Kohler vs. Hayes, which decision is printed in Volume 41 of the California Reports, page 445.)

Section 31o.—REMEDY OF SELLER IN CASE OF PURCHASER'S DEFAULT.—If the purchaser fails to make payments as they accrue, and lets the installments or any of them go by default, the seller has either one of two remedies: (1) He may, upon the default of the purchaser in meeting the stipulated payments, or any of them, treat the contract as no sale, and take the property into his own possession again. If he is prevented by the purchaser from retaking the property, he may go into court and recover it in a suit on claim and delivery. (2) Or, the seller may treat the sale as an absolute one, and bring a suit to recover each installment as default is made in payment; in which case, other property of the seller (not exempt from execution) may be attached and levied upon to pay the judgment obtained against him. (Decided by the Supreme Court, in the case of Holt Manufacturing Company vs. Ewing, which decision is printed in Volume 109 of the California Reports, page 353.)

Section 31p.—MONEY ALREADY PAID.—It is lawful for the contract to provide that all installments paid before default shall be forfeited as damages for the use of the property, or as rent, and such conditions, if fairly entered into, will be enforced by the law of California. The parties to a conditional installment sale have the right to agree upon a certain sum as damages, which is called "liquidated

damages," to belong to the seller in case of default on the part of the purchaser.

Civil Code, Section 1671.

Section 31q.—ABSOLUTE SALE ON INSTALLMENTS.—A sale of personal property, the purchase price to be paid in installments, may be made without any other conditions. In this case, the sale is absolute, and passes the title to the purchaser; and if default is made, the seller has no right to retake the property; but he may sue and put an attachment on the property for the purchase price.

Section 31r.—FORM OF CONDITIONAL AGREEMENT.—The following is a good form of agreement for conditional sale of personal property:—

San Francisco, Cal., ..., 190...

I promise to pay to .....
....., ...Dollars, at .....
....., Cal., as rent for .....
.....

(Here describe property.)

....., as follows:..... ..... Dollars before delivery of said property to me, and ..... Dollars per month on the ..... day of each and every ..... month thereafter, commencing on the ..... day of ....., 190..., with interest on the amount unpaid at the rate of ..... per cent per annum, payable monthly.

I acknowledge the receipt of said property, and agree that I will keep the same in good order, and that it shall not be removed from No. ..... Street, in the City of ....., without the written consent of said .....
....., and do also agree that until the sum of ..... Dollars with interest, as aforesaid, is fully paid, said property is the property of said .....
....., and that I have no right to dispose thereof; but when the total sum of .....
..... Dollars and interest has been paid, and not until then, I shall receive a bill of sale and the title to said property shall vest in me.

I also agree that if I fail to pay any of said installments when due, or perform any of the aforesaid conditions, or said property be attached or levied upon, all of said sum of ..... Dollars shall in any of said cases immediately become due and payable, and .... may enforce payment of the entire sum then unpaid and interest thereon; or may, if he so elect, rescind this executory contract and take possession, without legal process, of said property, and for that purpose may enter any premises where the same may be (all damages for said entry being hereby expressly waived); and thereupon, if said .... shall elect to rescind, and shall retake said property, they shall refund the money paid by me, if any remains, after deducting a rental for use of said property of ..... Dollars per month, expenses of taking possession and removal, and twenty per cent of total sum to be paid for liquidated and assessed damages, which rental, expenses, and damages I promise and agree to pay said ..... Said rental dating from delivery of said property to me.

In all matters herein mentioned, time is declared to be the essence of this contract.

....., Vendee.

I agree to the terms of the foregoing contract.

....., Vendor.

Section 31s.—SELLING AS A PLEDGE.—If the vendor, when the vendee fails to pay the installments, takes the property into his own possession again, he is not required to keep it; he may sell it as a pledge, apply the proceeds upon the amount due him from the buyer, and then sue the buyer for the balance. (Decided by the Supreme Court of California in the case of Matteson vs. Equitable Mining and Milling Co., which decision is printed in Volume 27, California Decisions, page 1024.)

Stoppage in Transit

Section 32.—WHEN SELLER OR CONSIGNOR MAY STOP GOODS IN TRANSIT.—A seller or consignor of goods, whose claim for the price has not been paid, may stop the goods while on their way to the buyer or consignee,

and may take possession of the goods. He may do this whenever it becomes known to him, after parting with the property, that the buyer or consignee is insolvent. A person is insolvent, in the meaning of the law, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to pay his debts. The property can be stopped only by notice to the carrier or holder of the goods, or by taking actual possession of the goods. As the taking of actual possession will be ordinarily impossible, where the goods are on the way to the buyer or consignee on board cars or vessels, a notice to the carrier not to deliver the goods will be sufficient to stop them; and if the carrier, notwithstanding such notice, delivers the goods to the buyer or consignee, the carrier will be liable to the seller or consignor in damages. The property can only be stopped while in transit. The transit of property is at an end when it comes into the possession of the consignee, or into the possession of his agent to receive it. Therefore, if the seller, after shipping the goods, discovers that the consignee is insolvent (that he has ceased to pay his debts in the usual manner, or has declared his inability or unwillingness to pay his debts), he must act promptly in order to stop the goods, and must give notice to the carrier not to make delivery. The sale of the goods is not rescinded by stopping them in transit. The seller simply resumes his vendor's lien for the price of the goods, and, if the consignee comes forward and pays the sum due on the purchase price, the goods must be released and allowed to proceed on their way. The seller, by stopping the goods in transit, does not become again the owner. He has parted with the title, but he again comes into possession, and holds the goods for the unpaid price. The carrier, after notice to stop, must deliver the goods to the vendor, and the vendor will then hold the property until the expiration of the credit given, and may then proceed to give notice and sell them again.

Civil Code, Sections 3076, 3077, 3078, 3079, 3080.

Section 33.—RESALE OF PERSONAL PROPERTY.—There has been some controversy in the courts as to the manner of reselling personal property held under a vendor's lien, but the safer method is to give written notice to the vendee, and publish notice to the public, of the time and place of sale, and then to sell the goods at public auction. No particular form of notice need be employed, as any words or form will be sufficient which describes the goods, the time and place of sale, and the manner and terms of the sale.

Section 34.—WHAT WILL DEFEAT VENDOR'S RIGHT TO STOP GOODS.—The right of stoppage in transit belongs only to one occupying in some way the relation of vendor toward the consignee of the goods. And where the goods are transferred by the vendee to a bona fide purchaser for value, this will defeat the vendor's right to stop the goods. Where the buyer has possession of the bill of lading, with the consent of the seller, and indorses it to a bona fide purchaser of the goods,—to one who has no notice of the seller's claim or the buyer's insolvency, and who pays value for the goods,—this will defeat the right to stop the goods. The consignee may intercept the goods on the way, and take possession of them at a different station or place from that of their destination, and the consignor's right of stoppage will be lost.

Warranty of Personal Property

Section 35.—WARRANTY OF TITLE.—A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present, or future. A warranty of the character, condition, or quality of personal property arises from contract, either express or implied. The parties may expressly state the warranty they agree upon, or a warranty may arise by reason of some obligation which the law imposes upon the parties or the circumstances. One who sells personal

property as his own thereby warrants that he has a good and unencumbered title to the property. The law implies this warranty from the fact of sale.

Civil Code, Section 1765.

Section 36.—WARRANTY ON SALE BY SAMPLE.—One who sells or agrees to sell goods by sample thereby warrants the quality of the bulk to be equal to that of the sample. Where goods are sold by sample, and the articles are inferior to the sample shown, the purchaser is not bound to accept the goods, for that would be to force upon him goods of a different quality from that which he bargained for. In a sale by sample the law implies a warranty that the bulk of the property sold is equal to the sample exhibited. This warranty constitutes a condition of the contract of sale, and in such case the delivery of the goods to the carrier for transportation to the buyer does not have the effect of passing title to the buyer. In order that the delivery of the goods to the carrier shall operate to pass the title to the consignee, it is essential that the goods so delivered shall conform in quantity and quality with the order given for them. If, therefore, the vendor sends more or less than the quantity ordered, or of a different quality, the title will not pass unless the purchaser accepts them. (Decided by the Supreme Court of California in the case of Gardiner vs. McDonogh, which decision is printed in Volume 28, California Decisions, page 776.)

Civil Code, Section 1766.

Section 37.—WARRANTY ON AGREEMENT TO SELL MERCHANDISE NOT IN EXISTENCE.—A person may agree to sell merchandise not then in existence, but he thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties; and the seller also warrants that such merchandise, when delivered, shall be as nearly sound and merchantable at the place of delivery as can be secured by reasonable care.

Civil Code, Section 1768.

Section 38.—MANUFACTURER'S WARRANTY AGAINST DEFECTS.—One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture; and also that neither he nor his agent in such manufacture has knowingly used improper materials therein; and one who manufactures an article, under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose; so, if it turns out either that the article manufactured is defective, which defect was not apparent or disclosed to the buyer, or that the article is not reasonably fit for the purpose for which it was ordered, the buyer has the right to rescind the sale, by returning or offering to return the article to the manufacturer.

Civil Code, Section 1769, 1770.

Section 39.—WARRANTY OF SOUNDNESS.—One who sells or agrees to sell merchandise not open to the examination of the buyer thereby warrants that such merchandise is sound and merchantable.

Section 40.—WARRANTY BY TRADE-MARKS AND OTHER MARKS.—One who sells any article to which there is affixed a trade-mark thereby warrants it to be genuine and lawfully used. And one who sells any article with a statement or mark upon it, or attached to it, expressing the quantity or quality of the article, or stating the place where it was manufactured, thereby warrants the truth of such representations.

Civil Code, Sections 1772, 1773.

(a)—**"Trade-Mark" Defined.**—The phrase "trade-mark," as used in Section 40, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper, usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any article to be goods imported, manufactured, produced, compounded, or sold by him; and also any name or names,

marks or devices, branded, stamped, engraved, etched, blown, or otherwise attached or produced upon any cask, keg, bottle, vessel, siphon, can, case, or package, used by any mechanic, manufacturer, druggist, merchant, or tradesman, to hold, contain or enclose the goods so imported, manufactured, produced, compounded, or sold by him.

Political Code, Section 3196.

(b)—**Recording Trade-Marks.**—Any person may record any trade-mark or name by filing with the secretary of state his claim to the same, and a copy or description of such trade-mark or name, with his affidavit attached thereto, setting forth that he (or the firm or corporation of which he is a member) is the exclusive owner, or agent of the owner, of such trade-mark or name. The secretary of state must keep for public examination a record of all trade-marks or names filed in his office, with the date when filed and name of claimant.

Political Code, Sections 3197, 3198.

(c)—**Assignment of Trade-Mark.**—Any person who has first adopted and used a trade-mark or name, whether within or beyond the limits of this state, is its original owner. Such ownership may be transferred and assigned in the same manner as personal property, by bill of sale.

Political Code, Section 3199.

(d)—**Protection of Trade-Marks.**—The law will protect the owner of a trade-mark in his exclusive use of the same. The superior court will restrain, by injunction, any use of trade-marks, or names, which have been recorded with the secretary of state by the owner, where such trade-marks or names are used by any person not entitled thereto. The Secretary of State must issue to the claimant, at the time the claim is filed, a certificate of filing under the great seal of the State, and must then collect from the claimant a fee of five dollars. The Secretary of State must, however, refuse

to file any trade-mark or name identical with, or so similar to any trade-mark or name already filed as to be calculated or liable to deceive.

Political Code, Section 3199; Act of the Legislature, approved March 6th, 1909.

Section 41.—WARRANTY OF PROVISIONS FOR DOMESTIC USE.—By a sale of provisions for domestic use, for immediate consumption, there is warranty that the provisions are sound and wholesome.

Civil Code, Section 1775.

Section 42.—WARRANTY ON SALE OF GOOD WILL OF BUSINESS.—One who sells the good will of a business thereby warrants that he will not endeavor to draw off any of the customers.

Civil Code, Section 1776.

Section 42a.—DAMAGES ALLOWED ON BREACH OF WARRANTY.—The general rule is, damages in case of a breach of warranty of quality, of personal property sold, are to be estimated with reference to values at the time and place of delivery. But where personal property is sold on a warranty, to be used at some place other than the place of sale and delivery, and it is known to the seller that the property is bought for use at another place, the damages for breach of the warranty may be estimated with reference to values at the place where the property is to be used. P. F. Dundon sold two boilers at San Francisco to be used in Siberia, and warranted that they would develop a certain horsepower. The boilers were constructed at San Francisco under a contract which required them to be delivered at the wharf in San Francisco, but it was understood by both parties that the boilers were to be sent to and used on the Amoor river in Siberia, 13,000 miles from San Francisco. When they were set up and used in Siberia they were found to fall short of the warranty, and could not develop sufficient power for the purpose for which they were bought. The

purchaser sued for damages, and the Superior Court of San Francisco gave him a judgment against Dundon for $7,200, the price paid for the boilers, which would have been their value in Siberia if constructed so as to do the warranted work. The Court of Appeals has affirmed the judgment.

(Decided by the California District Court of Appeals, in the case of Krasilnikoff vs. Dundon, which decision is printed in Appellate Decisions, volume VII, page 7.)

Auction Sales

Section 43.—AUTHORITY OF AUCTIONEER.—A sale by auction is a sale by public outcry to the highest bidder on the spot. Laws have been passed by the Legislature of California to regulate the authority of auctioneers, and the rights of bidders, and the manner of conducting auction sales. An auctioneer, by the law of California, without special authorization, has authority from the seller only to the extent that he may sell by public auction to the highest bidder; to sell for cash only, except such articles as are usually sold on credit at auction; to warrant the title of his principal to personal property sold by him, and the quality and quantity of the property; to prescribe reasonable rules and terms of sale; to deliver the things sold upon payment of the price; to collect the price; and to do whatever else is necessary, or proper and usual in the ordinary course of business, for effecting these purposes. An auctioneer will be deemed to have authority from a bidder at the auction, as well as from the seller, to bind both seller and bidder by a memorandum of the contract, whenever by law the sale must be evidenced by a memorandum in writing.

Civil Code, Sections 1792, 2362, 2363.

Section 44.—WHEN AUCTION SALE IS COMPLETE.—A sale by auction is not complete until the auctioneer publicly announces, by the fall of his hammer, or in some other customary manner, that the thing is sold.

Civil Code, Section 1793.

Section 45.—WITHDRAWAL OF BIDS.—Until the public announcement necessary to complete the sale is made by the auctioneer, any bidder may withdraw his bid. The only thing necessary to do in withdrawing a bid is to notify the auctioneer that the bid is withdrawn, before the final announcement of the sale.

Civil Code, Section 1794.

Section 46.—AUCTION SALE UNDER WRITTEN CONDITIONS.—Whenever an auction sale is made under written or printed conditions, the auctioneer must follow such conditions, and has no power to change them by any oral declaration, except that he may modify a condition intended for his own benefit.

Civil Code, Section 1795.

Section 47.—AUCTION SALE WITHOUT RESERVE.—Public policy requires that auction sales shall be conducted with the highest good faith, and that neither the auctioneer nor his principal shall be allowed to deceive or impose upon the persons who gather at an auction for the purpose of making bids. It is therefore provided by the law, for the protection of the bidder, that at a sale by auction, announced to be without reserve, the highest bidder in good faith has an absolute right to the completion of the sale to him. Upon such a sale bids by the seller, or bids by any agent for him, are absolutely void. The public is interested in securing the advantages of fair and just competition among bidders, and in the prevention of favoritism or fraud in any form. The highest bidder in good faith, at a sale without reserve, is entitled to the property; and, if it should appear that the property was in reality knocked down by the auctioneer upon a higher but fraudulent bid in the interest of the seller, a suit can be maintained in the Superior Court to compel the recognition of the rights of the bidder in good faith, and the delivery of the property to him upon payment of the amount of his bid.

Civil Code, Section 1796.

Section 48.—FRAUDS UPON THE BUYER.—Sometimes the seller, for the purpose of increasing the price of the property sold at auction, will employ puffers to bid up the property, thus giving it a fictitious value, and often inducing credulous bidders to increase their bids beyond what they had any idea of offering. The law provides, without any qualification, that the employment of puffers at an auction sale by the seller, without the knowledge of the buyer, is a fraud upon the buyer, which entitles him to rescind his purchase.

Civil Code, Section 1797.

Section 49.—AUCTIONEER'S MEMORANDUM OF SALE BINDS BOTH PARTIES.—When property is sold by auction, an entry made by the auctioneer in his sale book, at the time of the sale, giving the names of the person for whom he sells and the buyer, and describing the thing sold, the price, and the terms of sale, binds both the seller and the buyer, in the same manner as though the memorandum had been made by themselves.

Civil Code, Section 1798.

Deposit of Personal Property

Section 50.—DEPOSIT FOR SAFE KEEPING.—The obligations of one who receives personal property on deposit are fixed by statute. When personal property is deposited with one for safe keeping, the person receiving the deposit is bound to return the identical thing deposited with him; he is bound to use ordinary care in the safe keeping of the property, and if, by his gross carelessness or neglect, the thing deposited with him is lost or injured, he is liable to the depositor for its value.

Section 51.—DEPOSIT FOR EXCHANGE.—A deposit for exchange is one in which the depositary is bound to return to the depositor, not the identical thing deposited, but something corresponding in kind to it. Where money is received on deposit, or any article which is mingled with

the depositary's property of a like kind, and not expected to be returned to the depositor in the identical thing deposited, the depositor becomes a creditor of the other party, to the amount of the money or value of other property deposited.

Civil Code, Sections 1818, 1878.

Section 52. — OBLIGATIONS OF THE DEPOSITARY.—The depositary must deliver the property to the person for whose benefit it was deposited, on demand, unless he has a lien upon it. He is not bound to deliver the property without a demand being made for it, even where the deposit is made for a specified time. A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him. If a thing deposited is owned jointly or in common, by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share, if this can be done without injury to the thing deposited.

Civil Code, Sections 1822, 1823, 1824, 1827.

Section 53.—THINGS WHICH WILL EXCUSE DELIVERY.—There are some circumstances which will excuse delivery, even after demand is made. A third person may claim to be the real owner of the property, and establish his claim by law; or litigation may ensue between the depositor and another person claiming to be the real owner of the property, in which the court will enjoin the delivery or take the property into its own hands pending the litigation. Whenever any proceedings are taken adverse to the interest of the depositor, or adverse to the interest of the person for whose benefit the deposit was made, the person who received the deposit must give prompt notice of such proceedings to the depositor or other person beneficially interested. The depositary may also acquire a lien upon the property, which will excuse delivery; and generally he will have a lien upon the property, when he has performed services about the property, or incurred expense in its

keeping or preservation, for the value of his services and the amount of his expenses.

A depositary for hire has a lien for storage charges and for advances and insurance incurred at the request of the bailor, and for money necessarily expended in and about the care, preservation and keeping of the property stored, and he also has a lien for money advanced at the request of the bailor, to discharge a prior lien, and for the expenses of a sale where default has been made in satisfying a valid lien.

Act of the Legislature, approved April 19th, 1909.

(a)—**SALE OF PERSONAL PROPERTY.**—The sale by a pledgee, of property pledged, must be made by public auction, in the same manner as a sale of personal property under execution. Written notice must be posted in three public places in the township or city where the sale is to take place, for not less than five days nor more than ten days.

Code of Civil Procedure, Section 692.

Storage of Personal Property

Section 54.—STORAGE.—Where a person deposits personal property with another and agrees to pay him a compensation, it is called storage. Under this designation is included a variety of business transactions wherein one person takes charge and custody of the goods of another for hire.

Section 55.—CARE TO BE TAKEN OF THING DEPOSITED.—One who takes goods on storage for hire must use at least ordinary care for their preservation, and is liable for damages by reason of failure to perform his obligation in this respect.

Storage in Warehouses

Section 56.—WAREHOUSE RECEIPTS.—The most common form of storage known to business is that where

the owner of a warehouse receives property on storage for a stated compensation. The warehouseman, upon receiving the property, must give a receipt for it, which receipt must show on its face that a contract for storage has been entered into between the owner of the goods and the warehouseman, the latter to store the goods, and the former to pay for that service. A warehouseman cannot issue any valid receipt for any merchandise, grain, or other product or thing of value, unless the property has actually been received by him and is in the warehouse or under his control at the time; and no second warehouse receipt can be issued, so long as a former receipt is outstanding and uncanceled in whole or in part. A warehouse receipt is a negotiable instrument, and may be transferred by indorsement, and a transfer of the receipt is a good delivery of the goods represented by it. But it is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which will be considered by the law a good delivery of the property represented by the receipt. Therefore, such a receipt issued by one who is not in that business for profit, even though he receives the goods, will not have given to it by law the character of a negotiable instrument. In every case where a warehouseman receives property in a warehouse as a business for profit, the warehouse receipt is negotiable, and a transfer of the receipt in good faith, by indorsement to another, passes the title to the goods covered by the receipt.

Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

(a) The location of the warehouse where the goods are stored,

(b) The date of issue of the receipt,

(c) The consecutive number of the receipt,

(d) A statement whether the goods received will be

delivered to the bearer, to a specified person, or to a specified person or his order.

(e) The rate of storage charges,

(f) A description of the goods or of the packages containing them,

(g) The signature of the warehouseman, which may be made by his authorized agent,

(h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and

(i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

Act of the Legislature, approved March 19th, 1909.

Section 57.—NEGOTIABILITY OF WAREHOUSE RECEIPT.—A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt.

A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt, is a negotiable receipt.

When more than one negotiable receipt is issued for the same goods, the word "duplicate" shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to anyone who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it, "non-negotiable,"

or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable.

Act of the Legislature, approved March 19th, 1909.

Section 58.—REMOVAL OF PROPERTY BY WAREHOUSEMAN.—No warehouseman can sell or encumber, or ship or remove beyond his control, any property for which a receipt has been given by him, without the consent in writing of the holder of the receipt, and the consent of the holder must be plainly indorsed on the receipt.

Act of the Legislature, approved March 19th, 1909.

Section 59.—DELIVERY OF PROPERTY BY WAREHOUSEMAN.—A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

An offer to satisfy the warehouseman's lien;

An offer to surrender the receipt if negotiable, with such endorsements as would be necessary for the negotiation of the receipt; and

A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden is upon the warehouseman to establish the existence of a lawful excuse for such refusal.

A warehouseman is justified in delivering the goods, subject to the above provisions, to one who is—

The person lawfully entitled to the possession of the goods, or his agent;

A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper; or

A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee.

Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman will be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by law; and though he delivered the goods as authorized by law, he will still be liable if prior to such delivery he had either been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods.

Where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he will be liable to any one who purchases for value in good faith such receipt, for failure to deliver the goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods to the warehouseman; and

Where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he will be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the

goods by the warehouseman; unless the goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature.

Material and fraudulent alteration of a receipt will not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but will excuse him from any other liability to the person who made the alteration, and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration will acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase.

Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees.

The delivery of the goods under an order of the court will not relieve the warehouseman from liabilities to a person to whom the negotiable receipt has been negotiated for value without notice of the proceedings or of the delivery of the goods.

(a)—**Duplicate Receipt.**—A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncancelled at the date of the issue of the duplicate, but imposes upon him no other liability.

Act of the Legislature, approved March 19th, 1909.

Section 60.—LIABILITY OF WAREHOUSEMAN.—If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman will be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to the adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. If an adverse claimant does not bring suit and serve summons on the warehouseman within forty-eight hours after the service of notice of his adverse claim, such failure will act as a complete abandonment of such adverse claim.

A warehouseman will be liable to the holder of a receipt for damages caused by the non-existence of the goods or by failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, will not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonable careful owner of similar goods would exercise; but he will not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care.

A warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued,

as to permit at all times the identification and re-delivery of the goods deposited.

If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. The warehouseman will be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate.

If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they can not thereafter, while in the possession of the warehouseman, be attached by garnishment or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman will in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court.

Section 61.—**WAREHOUSEMAN'S LIABILITY FOR DELIVERING PROPERTY TO WRONG PERSON.**—A warehouseman must use ordinary care and diligence to ascertain whether an indorsement is genuine before delivering the property. And if he delivers the property to a person who has no right to it, when he might have ascertained the truth by the exercise of ordinary care and diligence, he will be liable to the owner of the goods.

Section 62.—**WAREHOUSEMAN'S LIABILITY FOR LOSS BY FIRE.**—No warehouseman is responsible for any loss or damage to property by fire while in his custody, if he exercises reasonable care and diligence for its

protection and preservation. If the property in his warehouse is destroyed by fire, in order to make him liable for the loss, it must be shown that his own neglect was the cause of the fire, or that, a fire occurring, he had the opportunity to save the property, but neglected to do so, with the means at hand.

Statutes of 1877-78, pp. 949, 950.

Section 63.—SALE OF PROPERTY FOR STORAGE CHARGES.—A warehouseman has a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien.

A warehouseman's lien may be enforced against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted; and against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person had been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.

A warehouseman loses his lien upon goods, by surrendering possession thereof, or by refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act.

If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed.

A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied.

A warehouseman's lien for a claim which has become due may be satisfied as follows: The warehouseman must give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice must be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice must contain,

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(b) A brief description of the goods against which the lien exists,

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue shall be paid on or before the day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale must be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, must be published once a week for two

consecutive weeks in a newspaper published in the place where such sale is to be held. The sale must not be less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement must be posted at least ten days before such sale in not less than six conspicuous places therein.

From the proceeds of such sale the warehouseman must satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds must be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods.

At any time before the goods are sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman must deliver the goods to the person making such payment, if he is a person entitled to the possession of the goods, on payment of charges thereon. Otherwise the warehouseman must retain possession of the goods according to the terms of the original contract of deposit.

If the goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and will incur no liability by reason thereof.

After goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman will not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable.

Section 63a.—NEGOTIATION OF WAREHOUSE RECEIPT.—A negotiable receipt may be negotiated by delivery where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer; or where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer, or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt must thereafter be negotiated only by the indorsement of such indorsee.

A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee.

A non-negotiable receipt can not be negotiated, and the indorsement of such a receipt gives the transferee no additional right.

A negotiable receipt may be negotiated by the owner thereof; or by any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery.

A person to whom a negotiable receipt has been duly negotiated acquires thereby such title to the goods as the person negotiating the receipt to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had, or had ability to convey to a purchaser in good faith for value; and he also acquires the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor, or a subsequent purchaser from the transferor, of a subsequent sale of the goods.

Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation will take effect as of the time when the indorsement is actually made.

A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants, that the receipt is genuine; that he has a legal right to negotiate or transfer it; that he has knowledge of no fact which would impair the validity or worth of the receipt; and that he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

The indorsement of a receipt will not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations.

A mortgagee, pledgee or holder for security of a receipt who in good faith demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, will not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quantity or quality of the goods therein described.

The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress.

Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof, to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, will have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation.

Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu will defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu.

Section 63b. — FRAUD BY WAREHOUSEMAN. — A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his control at the time of issuing such receipt, will be guilty of a crime, and upon conviction will be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

A warehouseman, or any officer, agent, or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, will be guilty of a crime, and upon conviction will be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

A warehouseman, or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncancelled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt, will be guilty of a crime, and upon conviction may be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, will be guilty of a crime, and upon conviction may be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt the negotiation of which would transfer the right to the possession of such goods is outstanding and uncancelled, without obtaining the possession of such receipt at or before the time of such delivery, will be guilty of a crime, and upon conviction may be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, will be guilty of a crime, and upon conviction may be punished for each offense by imprisonment

not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

Act of the Legislature, approved March 19, 1909.

Hotel Keepers and Lodging-house Keepers

Section 64.—LIABILITY OF HOTEL KEEPERS AND LODGING-HOUSE KEEPERS.—Hotel keepers (including boarding-house keepers) and lodging-house keepers have certain rights and liabilities fixed by statute. The language of the California statute referring to hotels is, "Inn keepers, hotel keepers, boarding and lodging-house keepers." There is no difference in the law between an inn and hotel. Both words mean the same thing. An inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests, for compensation,—a hotel. There is a difference between a hotel and a boarding-house, which is this: A hotel is a house where a keeper holds himself out as ready to receive all who may choose to come there and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode. There is no difference in the law between the liability of hotel keepers, boarding-house keepers, and lodging-house keepers. The law puts them all in the same class with reference to their liability for the property of their guests, boarders, or lodgers. Hotel keepers, boarding-house keepers, and lodging-house keepers in California are bound to use ordinary care and diligence in the protection and preservation of the personal property, other than money, of their guests, boarders, or lodgers coming into their houses; and they are liable for losses of or injuries to such property, if occasioned by their lack of ordinary care and diligence. The law passed by the Legislature in 1895 limited the liability of hotel keepers, boarding and lodging-house keepers, to losses occasioned

by their lack of ordinary care and diligence, but does not include money within its terms; consequently it seems that greater and more exacting care must be taken of the money of a guest, boarder, or lodger than is required to be exercised with reference to other kinds of personal property. The law provides, however, that in no case of loss of or injury to personal property, other than money, shall the liability of the hotel keeper, boarding-house keeper, or lodging-house keeper exceed the sum of $100 for each trunk and its contents, $50 for each valise and traveling bag and contents, and $10 for each box, bundle or package and contents, placed under his care, unless he has consented in writing with the owner to assume a greater liability. It is customary to give receipts in writing for money left or deposited by guests, and in such case the liability would be for the amount shown by the receipt, in case of loss.

Civil Code, Section 1859.

Section 65.—EXEMPTION FROM LIABILITY IN CERTAIN CASES.—The courts had held hotel keepers to such a strict liability that the Legislature was induced, in 1895, to pass a law making practically an exemption in certain cases, and modifying to a great extent the extreme strictness of the law as it then stood in this State. By the law passed in 1895, and which is now in force, if a hotel keeper, or boarding-house or lodging-house keeper, keeps a fireproof safe, and gives notice to his guest, boarder, or lodger that he keeps such a safe, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless such articles are placed in the safe, he will not be liable for any loss or damage to such articles if not deposited with him to be placed in his safe, provided, that he does not by his own acts contribute to the loss of the property. This law also provides that, in any case, the hotel keeper, boarding-house keeper, or lodging-house keeper shall not be liable for more than $250 for loss of any money, jewelry, or documents, or

other articles of unusual value and small compass, belonging to any guest, boarder, or lodger, unless he shall have given a receipt in writing for such property. Just what the law means by a "receipt in writing," and how that fact alone should make the liability greater, is difficult to understand; but it is probable that the Legislature meant to provide, by this language, that where a receipt is given acknowledging a greater value, then the liability for the loss shall be equal to the admitted value of the property, and that where no receipt is given, no value in excess of $250 shall be left to be determined by the conflicting testimony of witnesses. The notice provided for in the law need not be in any particular form, and it may be given personally to the guest, boarder, or lodger, or it may be given by putting up a printed notice in a prominent place in the office or in the rooms of the house.

Civil Code, Section 1860.

Section 66.—WHAT PROPERTY MUST BE DEPOSITED IN THE SAFE.—Under the notice provided for by law to be given by the hotel keeper, boarding-house keeper, or lodging-house keeper, he cannot demand that his guest put every article of small compass and peculiar value, or all his money or jewelry, in the safe. The law does not apply to such articles as the guest needs to have about him, for constant and daily use, even though for personal adornment. Jewelry worn by a woman daily need not, when not actually upon her person, be deposited in the safe, in order to make the hotel keeper or boarding and lodging-house keeper responsible for its loss in his house. If worn daily, the jewelry does not cease to be needed for present personal use when its possessor lays it aside upon retiring for the night. Nor is it necessary, in order to render the hotel keeper liable, that the property should have been delivered into his exclusive personal possession. The guest may retain personal possession of his goods within the house—as of his trunk and its contents, his wearing apparel, and other articles in his room,

and any jewelry or valuables carried or worn around his person—without discharging the keeper of the house from responsibility. Therefore the Act of 1895, referred to in the preceding section, is not intended to apply, and does not apply, to the articles just enumerated, needed by the guest for daily use; for it would be a manifest absurdity to require the guest, upon retiring for the night, to leave his personal apparel, or anything carried or worn around his person, in the house safe. The law only applies to such articles as are not needed by the guest for daily use.

Section 67.—LIABILITY OF HOTEL, BOARDING-HOUSE, AND LODGING-HOUSE KEEPERS FOR LOSS BY FIRE.—In some of the States of the Union the keeper of a hotel is held to be an insurer against loss by fire, and is bound to pay for property lost by a fire, no matter from what cause occurring. But this extreme view is not the law of California. In this State, when a fire occurs, and destroys or injures the property of a guest, boarder, or lodger, the keeper of the house is not liable to pay the damage if he can show that the fire was purely accidental, and that neither his negligence nor the negligence of his servants or employees contributed to the loss. But if the fire occurs through the negligence of the proprietor, or by the neglect of any of his servants or employees, he will be liable for damage to the property of his guests. Thus, if a cook or fireman negligently leaves coals or ashes containing fire in a position which ignites and destroys the house, or if a chambermaid negligently sets fire to the furniture of a room, or if a porter or bellboy sent to build a fire in the room of a guest sets fire to the house, or if a sufficient watch is not kept, or reasonable protection and guard against fire is not maintained, the keeper of a hotel, boarding-house, or lodging-house will be liable in this State for loss by fire. But where the keeper of the house has done all that a reasonable man can do to guard against the danger from fire, and a fire occurs, without any negligence on his own part or on the part of any of his servants or

employees, he will not be liable. Thus, if a fire starts in an adjoining building, or in some other quarter of the town, and reaches and sweeps away his own house; or if a fire occurs by reason of lightning, earthquake, or floods, he will not be liable for losses to his guests, boarders, or lodgers. Indeed, it may be said that it is the law of this State that in no case of loss by fire is the keeper of a hotel, boarding-house, or lodging-house liable for the property of guests, where the fire was purely accidental, and was not occasioned by anything which reasonable care and prudence on the part of himself or his servants and employees might have avoided or prevented.

Section 68.—LIABILITY OF HOTEL, BOARDING-HOUSE, AND LODGING-HOUSE KEEPERS FOR LOSS BY THEFT.—The liability of the keeper of a hotel, boarding-house, or lodging-house for losses of the property of his guests, boarders, or lodgers, by theft, depends upon whether the thieves come from within the house. If the property is stolen by some one employed in the house, in any capacity, or even by a guest, boarder or lodger, without the fault of the person from whom the property is taken, the keeper of the house will be liable for its loss. But if burglars or rioters break into the house and steal, this will constitute an act which the keeper of the house could not very well have had any control over, and hence he will not be liable, if he kept his house secured in a reasonable manner.

Section 69.—LIABILITY OF HOTEL, BOARDING-HOUSE, AND LODGING-HOUSE KEEPERS FOR LOSS OF BAGGAGE.—The liability for loss of baggage begins at the moment the hotel, boarding-house, or lodging-house keeper takes charge of the baggage, whether at the house or elsewhere. Therefore, if a porter solicits a guest at a railroad train, or ferry, or depot, and receives the traveler's check, and indicates the conveyance which the traveler shall take to the house, the keeper is responsi-

ble from that moment for the safe delivery of the baggage at the guest's room, and, if it is lost on the way, the keeper of the house is liable. After the baggage has reached the house, the keeper is responsible for its safety, and will be liable for its loss, if the owner of the baggage is not guilty of any negligence which contributes to the loss. After the baggage leaves the house, to be taken to a depot, train, or ferry by the employees of the keeper of the house, his liability continues until the baggage safely reaches its destination there.

Section 70.—LIEN OF HOTEL, BOARDING-HOUSE, AND LODGING-HOUSE KEEPER ON BAGGAGE AND OTHER PROPERTY.—A hotel, boarding-house, or lodging-house keeper has a lien upon the baggage and other property of his guest, boarder, or lodger, brought into his house, for the compensation due him. This lien includes his charges for accommodation, board, and lodging, and room rent, and such extras as have been requested and furnished. If the bill is not paid when due, the keeper of a hotel, boarding-house, or lodging-house has the right to take possession of the baggage and other personal property of the guest, boarder, or lodger, in the house, and keep possession until the debt is paid.

Civil Code, Section 1861.

Section 71.—SALE OF UNCLAIMED BAGGAGE BY HOTEL, BOARDING-HOUSE, AND LODGING-HOUSE KEEPERS.—Whenever any trunk, carpet-bag, valise, box, bundle, or other baggage, in the possession of a hotel, boarding-house, or lodging-house keeper, remains there unclaimed for the period of sixty days, the property may be sold by him at public auction, and out of the proceeds of the sale he may retain the charges for storage and the expenses of advertising and sale. A notice of at least four weeks, that the property will be sold at auction, must be published in a newspaper. If there is no newspaper in the place where the house is located, then the notice must

be published in a newspaper printed at the nearest city or town. The notice of the sale must be published once a week for four successive weeks, and the notice must contain a description of each trunk, carpet-bag, valise, box, bundle, or other baggage, which it is intended to sell, also the name of the owner, if known, the name of the person selling, and the time and place of the sale. If there is any balance left, after retaining enough to pay storage charges and the expenses of the sale, and this balance is not claimed by the rightful owner within one week from the day of sale, the money must be paid into the Treasurer's office of the county where the sale takes place; and if no claim is made upon the County Treasurer for the money within one year, it goes into the County General Fund.

Civil Code, Section 1862.

Section 72.—STATEMENT OF CHARGES, ETC., TO BE POSTED BY HOTEL, BOARDING-HOUSE, AND LODGING-HOUSE KEEPERS.—A statement of charges is required by the law to be posted in every hotel, boarding-house, and lodging-house in this State. The Civil Code, Section 1863, is as follows: "Every keeper of a hotel, inn, boarding or lodging-house shall post, in a conspicuous place, in the office or public room, and in every bedroom of said hotel, boarding-house, inn, or lodging-house, a printed copy of this section, and a statement of charges, or rate of charges, by the day, and for meals or items furnished, and for lodging. No charge or sum shall be collected or received by any such person for any service not actually rendered, or for any item not actually delivered, or for any greater or other sum than he is entitled to by the general rules and regulations of said hotel, inn, boarding or lodging house. For any violation of this section, or any provision herein contained, the offender shall forfeit to the injured party three times the amount of the sum charged in excess of what he is entitled to."

Section 72a.—DEFRAUDING HOTEL KEEPERS.—Any person who obtains any food or accommodation at a hotel, inn, restaurant, boarding-house, or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at a hotel, inn, restaurant, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at a hotel, inn, restaurant, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food or accommodations, is guilty of a misdemeanor. If a person is convicted of this offense, he is punishable by imprisonment in the County Jail not exceeding six months, or by fine not exceeding $500, or by both fine and imprisonment.

Statutes of 1903, p. 22; Penal Code, Section 19.

Landlord and Tenant

Section 73.—LEASES OF REAL ESTATE.—The Legislature of California has passed laws regulating by statute the making of leases of real estate. It is the policy of this State to discourage long leases, which have the effect of tying up property for many years, and therefore the law prescribes the longest terms for which real estate may be leased in California, and the courts have sustained these regulations as being wise and prudent.

Section 74.—FOR WHAT TERM LEASES MAY BE MADE IN CALIFORNIA.—A lease of land for agricultural purposes, in which is reserved to the owner any rent or service of any kind, can be made for fifteen years, and no longer. A lease of a town or city lot, in which is reserved to the owner any rent or service of any kind, can be made for fifty years, and no longer; provided, that the property of any municipality, or any minor or incompetent person, cannot be leased for a longer period than ten years.

Statutes of 1903, p. 274.

Act of the Legislature, approved April 19, 1909.

Section 75. — WHEN VERBAL LEASE MAY BE MADE. — A lease for a term not exceeding one year may be made verbally, and need not be witnessed by any writing whatever.

Section 76.—WHEN LEASE MUST BE IN WRITING. —A lease for a term longer than one year must be in writing.

Section 77.—FORM OF LEASE.—A lease is not required to be in any particular form, so long as it can be ascertained from its terms what property is leased, the rent reserved, and the term for which the lease is made. The lease must be signed by the parties, of course, but it is not required to be acknowledged. Without acknowledgment before a Notary, and without recording, a lease is good between the parties to it. But, as the rights of creditors, and other claims of third parties, may involve the property in litigation, it is always safest and best to acknowledge and record a lease, as in this manner a binding notice of the execution and terms of the lease is given to the world. Following is a form of lease for common use in California:

THIS INDENTURE, made the ..... day of ...., 190.., witnesseth:—

That I, ..., of the County of ....., State of California, lessor, do hereby lease, demise, and let unto ...., of the same place, lessee, the following described real estate situate, lying, and being in the County of ....., State of California, and particularly described as follows, to-wit: ....

(Here insert description of property.)

To have and to hold, for the term of ..... years, to-wit: from the ..... day of ....., 190.., to the ..... day of ....., 190.., yielding and paying therefor the rent of .... Dollars, Gold Coin of the United States of America; and the said lessee promises to pay the said

rent in such Gold Coin, at and in the following times and installments, namely, ... Dollars on the ..... day of ....., 190..., ... Dollars on the ..... day of ....., 190..., and ..... Dollars on the ..... day of ....., 190...

(Or, in place of above, insert for monthly payments, as follows: In such Gold Coin, as follows, to-wit: the sum of ..... Dollars per month, monthly in advance, on the ..... day of each and every month during said term.)

And the said lessee promises to quit and deliver up the premises to the lessor or his agent or attorney, peaceably and quietly, at the end of the term, in as good order and condition (reasonable use and wear thereof, and damages by the elements excepted) as the same are now or may be put into, and to pay the rent as above stated during the term, and not to make or suffer any waste thereof, nor lease, nor underlet, nor permit any other person or persons to occupy or improve the same, or make, or suffer to be made, any alteration therein, without the consent of the lessor thereto in writing having been first obtained; and that the lessor may enter to view and make improvements, and to expel the lessee if he shall fail to pay the rent as aforesaid, or make or suffer any waste thereof.

And should default be made in the payment of any portion of said rent when due, the said lessor, his agent or attorney, may at his option terminate this lease, and re-enter and take possession of said property.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

.....(Seal.)
.....(Seal.)

Section 77a. — FORM OF LEASE OF AGRICULTURAL LANDS.—The following is a form of lease of agricultural lands:

THIS INDENTURE, made the ..... day of ....., in the year of our Lord one thousand nine hundred and .....; between ...., of the County of ...., State of California, the party of the first part, and ....., of said County and State, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved and contained on the part of the said party of the second part, to be paid, kept, and performed, has granted, demised, and to farm let, and by these presents does grant, demise, and to farm let, unto the said party of the second part, all those lots, pieces, or parcels of land, situate in the County of ....., State of California, and particularly described as follows, to-wit:

.....

(Here describe land.)

.....

for the term of ..... years from the ..... day of ....., 190...

To have and to hold the said demised premises, unto the party of the second part, his heirs, executors, and administrators, for his and their sole and proper use and benefit, for and during the term aforesaid, together with all the tenements and hereditaments thereunto appertaining; and all the stock and farming utensils, of every name and nature, now being in or upon the same, belonging to the said party of the first part.

In consideration whereof, the said party of the second part hereby covenants and agrees to and with the party of the first part, that he will occupy, till, and in all respects cultivate the premises above mentioned, during the term aforesaid, in a farmerlike manner, and according to the usual course of farming in the neighborhood; that he will not commit any waste or damage or suffer any to be done; that he will, at his own cost and expense, keep the fences and buildings on the said premises in good repair, reasonable wear thereof and damages by the elements excepted; that he will pay the party of the first part as rental for said premises for said term the full sum of ..... Dollars, Gold Coin of the United States, as follows, to-wit: ..... Dollars on the .... day of ....., 190..., and the remainder in equal yearly payments of ..... Dollars, on the ..... day of ....., in each and every year during said term of ..... years; that this lease cannot and will not be assigned without the written consent of the lessor; and that he will give up and yield peaceable possession of the said premises at the expiration of said term.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

.....(Seal.)
.....(Seal.)
(Acknowledgment in usual form.)

Section 77b.—ASSIGNMENT OF LEASE.—The lessee may make an assignment of the lease, with the written consent of the lessor; or, if the lease contains no provision against assignment without consent, then the lessee may make an assignment of the lease without the consent of the lessor.

Section 77c.—FORM OF ASSIGNMENT OF LEASE.—The following is a form of assignment of lease:

KNOW ALL MEN BY THESE PRESENTS: That I, ..., of the County of ....., State of California, for and in consideration of the sum of ..... Dollars, Gold Coin of the United States, to me in hand paid by ....., of the same place, do by these presents sell, convey, assign, transfer, and set over unto the said ...., a certain indenture of lease bearing date the ..... day of ....., 190..., made by ....., of the County of ....., State of California, to me, of a certain lot, piece, or parcel of land situate in the County of ....., State of California, and particularly described as follows, to-wit: ....

(Here describe property.)

.... for the term of ..... years, reserving unto the said ..... the rent of ..... Dollars, payable in .... (monthly or yearly) payments of ..... on the ..... day of ..... in each and every .... (month or year) .... during said term, with all and singular the premises therein mentioned and described, and the buildings thereon, together with the appurtenances.

To have and to hold the same unto the said ...., his heirs, executors,

and administrators, from the ..... day of ....., 190..., for and during all the remainder yet to come of the said term of ..... years, mentioned in said indenture of lease. And I do hereby covenant and agree to and with the said ...., that the said assigned premises now are free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments, and incumbrances, by me suffered, made, or created.

In witness whereof, I have hereto set my hand and seal the day and year first above written.

.....(Seal.)

(Acknowledgment in usual form.)

Section 78.—WHAT REPAIRS LESSOR MUST MAKE.—The lessor of a building intended for the occupation of human beings must, unless there is an agreement to the contrary, put the building into a condition fit for occupation, and keep it in tenantable repair during the term of the lease. If the building gets out of repair by the fault of the tenant, or in a dangerous condition by reason of the tenant's lack of ordinary care, the lessor is not bound to make such repairs, but the tenant himself will be liable to make them.

Civil Code, Sections 1941, 1949.

Section 79.—WHEN LESSEE MAY MAKE REPAIRS.—When dilapidations have been occasioned to a dwelling which the landlord ought to repair, but neglects to do so, the tenant may make the repairs himself, provided the cost of such repairs is not more than one month's rent of the premises; and the tenant may deduct the cost of such repairs as he is compelled to make from the rent. But, before he can legally make the repairs himself, so as to deduct the cost from the rent, he must give reasonable notice to the lessor, stating the character of the dilapidations and the repairs needed, and that the lessee intends to make the repairs if the lessor does not. This notice may be given verbally or in writing. If after such notice the

lessor refuses or neglects to make the repairs, the lessee may vacate the premises, in which case he will be discharged from further payment of rent, or the performance of the other conditions of the lease. The law gives the tenant the privilege of vacating the premises in case the landlord neglects to make the repairs needed, and also authorizes him, if he prefers, to remain and make the repairs himself, when they do not require an expenditure exceeding one month's rent. The law relates only to buildings intended to be occupied by human beings, and the Supreme Court of this State has intimated in several decisions that the tenant of business property has no right to make repairs himself at the expense of the landlord, and that the lessor of business property is not required by the law to keep the building in repair at all. So far as business property is concerned, that is, buildings not intended for human habitation, for residence, the law leaves the matter of repairs to be determined solely by the terms of the agreements in the lease.

Civil Code, Section 1942.

Section 80.—TERMINATION OF LEASE.—A lease is terminated by the expiration of the term, or by the happening of some event which works a forfeiture of the lease, or by consent of the parties. A lease is terminated, as a matter of course, at the end of the term. So, too, it is, of course, within the power of the parties to agree, before the end of the term, for the termination of the lease at any time. The lease may provide that, if any condition of the lease be broken, as for non-payment of the stipulated rent at the time agreed upon, or for breach of a covenant not to assign the lease without the consent of the lessor, the lease shall be terminated, and a breach of the condition will terminate the lease.

Section 81.—RENEWAL OF LEASE.—A lease may provide by its terms for its renewal, and the lessee will have the right to a renewal of the lease according to the

agreement. But if the lease gives the privilege of renewal for a further term, the lessee must, before the expiration of the original term, give the lessor notice that he elects to renew the lease; and if he does not give such notice, his right to insist upon the privilege of renewal is lost. If a lessee of real property remains in possession after the expiration of the term, and the lessor accepts rent from him, the law presumes that the parties have renewed the contract on the same terms and for the same time, but not exceeding one month, when the rent is payable monthly, nor in any case exceeding one year. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of the term without any demand for possession or notice to quit by the landlord, he will be deemed to be holding by permission of the landlord and will be entitled to hold the land under the terms of the lease for another full year. (Act of the Legislature, approved February 28, 1905.)

Civil Code, Section 1945.

Section 82.—TERM OF HIRING WHEN NO LIMIT IS FIXED.—By the statute of California it is provided, that a hiring of real property, other than lodgings and dwelling-houses, in places where there is no custom on the subject, is presumed to be for one year from its commencement, when no limit is fixed to the term by the agreement between the parties. The hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus, a hiring at a monthly rate of rent is presumed to be for one month. If there is no agreement respecting either the length of time or the rent, the hiring is presumed to be monthly.

Civil Code, Sections 1943, 1944.

Section 83.—WHEN RENT IS PAYABLE.—The law provides, that when there is no usage or contract to the

contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due.

Civil Code, Section 1947.

Section 84.—NOTICE TO QUIT.—When the term of hiring of real property is not specified by the parties, to terminate the hiring, one of the parties must give notice to the other of his intention to end the hiring. The tenancy may be terminated by the landlord giving notice to the tenant, in writing, to remove from the premises. The notice must specify the time within which the tenant must remove from the premises, and must give him a period of not less than one month. After this notice has been served, and the period specified in the notice has expired, the landlord may proceed to recover possession, either by re-entering and taking possession or by a suit in court. Three days' notice only is required to be served on a tenant under a lease for a stated term. If such tenant fails to pay the rent agreed upon, the landlord, at any time within one year after the rent becomes due, may give three days' notice, in writing, requiring the payment of the rent within that time; and this notice must also be served on any subtenant who may be in possession of any portion of the premises. If the tenant has broken some other condition of the lease, the same written notice must be served on him, and on subtenants, if there be any, requiring him to perform the conditions of the lease or surrender the possession of the property. The lease will be saved from forfeiture if the rent is paid or other condition of the lease performed within three days after service of the notice. If the rent is not paid or condition performed within three days after service of the notice, the landlord may recover possession of the property in a suit for unlawful detainer.

Civil Code, Sections 789, 1946; Code of Civil Procedure, Section 1161.

(a)—**Raising the Rent.**—The legislature has passed a law providing that a notice of raising rent shall have legal effect. The law reads: "In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least thirty days before the expiration of the month, change the terms of the lease to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent, and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month."

Act of the Legislature, in effect February 26, 1907.

Section 85.—HOW NOTICE TO QUIT MUST BE SERVED.—The notice to quit must be served either by delivering a copy to the tenant personally; or, if he is absent from his place of business or residence, by leaving a copy of the notice at either place with some person of suitable age and discretion, and sending a copy through the mail, addressed to the tenant at his place of residence; or if his place of business or residence cannot be ascertained, or if no person of suitable age and discretion can be found at either place, the notice may be served by posting a copy in a conspicuous place on the premises, and delivering a copy to any person found residing there, and also sending a copy through the mail addressed to the tenant at the place where the property is situated.

Code of Civil Procedure, Section 1162.

Section 85a.—FORM OF NOTICE TO QUIT.—A notice to quit need not be in any particular form to be valid. It is sufficient, in any form, if it shows on its face that possession is demanded, and that the time fixed by the statute is given. The following is a form of notice to quit, to be served where the tenancy is for no definite term:

....., State of California, ..., 190...

To .....,

Take notice that you are hereby required to quit and deliver up to me the possession of the premises now held and occupied by you, known as .....

.....

(Here describe the premises.)

.....

on the ..... day of ....., 190...

This is intended as a one month's notice to quit, for the purpose of terminating your tenancy.

.....

Landlord.

Section 85b.—FORM OF NOTICE TO PAY RENT OR SURRENDER POSSESSION.—The following is a form of three days' notice to pay rent or surrender possession:

....., State of California,

....., 190...

To .....,

You are hereby required to pay the rent of the premises hereinafter described, and which you now hold possession of, amounting to the sum of ..... Dollars, being the amount now due and owing to me by you, within three days after service of this notice as required by law, or deliver up to me the possession of the said premises.

Said premises are situated at .....

....., and described as follows, to-wit:

.....

(Here describe property.)

.....

.....

Landlord.

Section 86.—OPTION TO PURCHASE IN LEASE.—The lessor may provide in the lease that the lessee shall have the right to purchase the leased premises at some time within the term. If the lessee concludes to take advantage of the option given him, he must so notify the lessor, and tender the purchase price agreed upon in the lease. If he notifies the lessor that he will take the property, as provided for in the lease, and tenders the purchase price,

the lessee will have the right to a deed, and the lessor can be compelled to execute his deed to the property.

Section 86a.—**FORM OF LEASE OF PERSONAL PROPERTY.**—The following is a form of lease of personal property:

THIS INDENTURE, made this.....day of ....., 190.., between....., of the County of....., State of California, the party of the first part, and....., of the same place, witnesseth:

That in consideration of the rents, covenants and agreements to be paid and performed on the part of the said party of the second part, the said party of the first part does hereby lease to the party of the second part all those certain goods and chattels, situate at ....., and particularly described as follows, to wit:

.....

(Here give a particular description of each article of personal property.)

.....

To have and to hold the same to the said lessee, for the term of ..... years, beginning ...., 190.., and ending ...., 190.., the said lessee paying therefor the yearly rent of ..... Dollars during the said term.

And the said lessee covenants and agrees with the said lessor that he will pay the rent aforesaid, in monthly payments of ..... Dollars each, on the first day of each and every month during said term; and that he will not assign nor underlet this lease or the said goods and chattels, nor any part thereof, without the written consent of said lessor; and that he will, at his own expense, replace any and all of said goods and chattels which shall be lost, or carelessly or accidentally injured, during the said term; and at the expiration of said term, or sooner termination of this lease, he will restore the said goods and chattels to the said lessor, in the like good order in which they now are, wear and diminution resulting from reasonable use and unavoidable casualties excepted. And it is agreed that, until the expiration of said term, or until condition broken, said party of the second part shall peaceably retain posses-

sion of said goods and chattels, but in case any one or more of the conditions of this lease are broken by the said party of the second part, the party of the first part may at any time, day or night, enter the place where said goods and chattels, or any part thereof, may be, and remove the same, and he may use all necessary force to remove the property herein described.

And it is further agreed that time is of the essence of this contract.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

.....(Seal.)
.....(Seal.)

Section 86b.—TENANT MUST DELIVER NOTICE SERVED ON HIM.—Every tenant who receives notice of any proceeding to recover the real property occupied by him, or its possession, must inform his landlord immediately, and must also deliver to his landlord the notice he received, if in writing; and if the tenant fails to inform his landlord of any such notice, or to deliver the notice to him, if in writing, he will be liable to the landlord for all damages which he may sustain by reason of his failure.

Civil Code, Section 1949.

Section 87.—FORM OF FARMING LEASE ON SHARES.—The following is a form of farming lease on shares:

THIS INDENTURE, made the ..... day of ....., 190.., between .... of the County of ....., State of California, the party of the first part, and ...., of the same place, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved and contained on the part of the said party of the second part, his executors or administrators, to be paid, kept, and performed, has granted, demised, and to farm let, unto the said party of the second part, his executors or administrators, all those certain lots, pieces or

parcels of land situate, lying and being in the County of ....., State of California, and particularly described as follows, to wit:

.....

(Here describe the land.)

.....

To have and to hold the said demised premises, unto the party of the second part, his heirs, executors, or administrators, for his and their sole and proper use and benefit, for and during the term of ..... years, beginning ....., 190.., and ending ..... 190.., together with all the tenements and hereditaments thereunto appertaining, and all the stock and farming utensils, of every name and nature, now being in or upon the same, belonging to the said party of the first part.

In consideration whereof, the said party of the second part hereby covenants and agrees to and with the said party of the first part, that he will occupy, till and in all respects cultivate the premises above mentioned, during the term aforesaid, in a farmerlike manner, and according to the usual course of farming practiced in the neighborhood; that he will not commit any waste or damage, or suffer any to be done; that he will, at his own cost and expense, keep the fences and the buildings on the said premises in good repair, reasonable wear thereof and damages by the elements excepted; and that he will deliver to the said party of the first part, his heirs, executors, or administrators, or to his or their order, each year during the term of this lease, one equal (here insert share agreed on) of all the proceeds and crops produced on the said farm and premises aforesaid, of every name, kind and description, to be divided on the said premises, in stack and sack, according to the usual course and custom of making such divisions in the neighborhood, and in a seasonable time after such crop or crops shall have been gathered and harvested.

It is further understood and agreed between the aforesaid parties, that the party of the second part shall find all seed or seeds necessary to be sown on said premises; that the party of the second part is to do, or cause to be done, all necessary work and labor in and about the cultivation of the said premises; that he is to have full permission to inclose, pasture, or till and cultivate, the said premises, so far as the same may be done without injury to the reversion, and to cut all necessary timber for firewood, farming

purposes and repairing fences; and that he is to give up and yield peaceable possession of the said premises at the expiration of said term. Said first party shall furnish on said premises, at the proper time in each year during the term of this lease, sacks sufficient to hold all the grain coming to said first party.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

.....(Seal.)
.....(Seal.)

(Acknowledgment in usual form.)

Sale of Real Property

Section 87a.—TRANSFER BY DEED.—The title to real property is transferred from one to another by an instrument in writing called a deed. A deed must be signed by the vendor, and acknowledged by him before a Notary, or other officer having authority to take acknowledgments, and must be recorded in the office of the County Recorder of the county where the land is situated.

(a).—CONDITION AGAINST SALE OF LIQUOR.—Conditions inserted in a deed that intoxicating liquors shall not be sold on the conveyed premises, and providing that the estate granted shall become forfeited for a breach thereof, are lawful and enforceable. (Decided by the Supreme Court of California, in the case of Burdell vs. Grandi, which decision is printed in Volume XXXIV of California Decisions, page 519.)

Section 87b.—DEED TO COMMUNITY PROPERTY.—Property acquired by husband and wife, during their marriage, by their joint efforts, is community property. All property acquired during marriage is community property, except property owned by either before marriage, or property acquired by either after marriage by gift, will, or as heir of a deceased person. The husband may sell the community property, for an adequate consideration, and make a valid deed signed by himself alone. But he cannot make a deed of gift of the community property,

without his wife's consent; nor can he sell the community property at all, without the wife's consent, unless he receives a fair and reasonable price for the property. Considering that there might be, in case of disputes, a great variety of opinions as to what is an adequate price for a piece of property, the most conservative business men always require the wife's signature to the husband's deed to community property, even where the law does not require it. Her signature can do no harm, and may prevent costly disputes. There are cases, however, where the husband desires to sell community property, and the wife refuses to sign the deed. In this case, if the property is community property, and if the price paid is the full value of the property, the title of the purchaser will be absolutely good, with the husband's deed alone, without the wife's signature.

Section 87c.—DEED TO SEPARATE PROPERTY.—Either husband or wife has the right to deed his or her separate property, without the consent of the other, and without the signature of the other to the deed.

Section 87d.—DEED OF GIFT.—A property consideration is not necessary to a valid deed in California. A deed of gift, for love and affection, may be made by one person to another of real property, and the deed will be for a consideration which the law recognizes as sufficient and will sustain.

Section 87e.—FORM OF DEED OF GIFT.—The following is a form of deed of gift, for use in the State of California:—

THIS INDENTURE, made the ..... day of ...., 190..., between ...., of the County of ....., State of California, the party of the first part, and ...., of the same place, the party of the second part, witnesseth:—

That the said party of the first part, for and in consideration of the love and affection which the said party of the

first part has and bears unto the said party of the second part, as also for the better maintenance, support, protection, and livelihood of the said party of the second part, does by these presents give, grant, alien, and confirm unto the said party of the second part, and to ..... heirs and assigns forever, all those certain lots, pieces, or parcels of land situate, lying, and being in the County of ...., State of California, bounded and particularly described as follows, to-wit: .....

.....

(Here describe property.)

.....

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, ... heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set ..... hand and seal the day and year first above written.

.....(Seal.)

STATE OF CALIFORNIA, } ss.
County of ..... }

On this ..... day of ....., A. D. one thousand nine hundred and ....., before me, ..., a Notary Public in and for said ..... County and State, residing therein, duly commissioned and sworn, personally appeared ...., known to me to be the person... whose name... ..... subscribed to and who executed the within instrument, and ..... acknowledged to me that ..... executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the ..... County of ....., the day and year in this certificate first above written.

.....

Notary Public in and for the.....
County of ....., State of California.

Commission expires ....., 19....

Section 87f. — BARGAIN AND SALE DEED. — The most common form of transfer of real estate is by bargain and sale deed. In such a deed, the true consideration need not be stated. If the consideration, for instance, is $500, it may be stated in the deed at $1.00, or any other sum. The law presumes that an adequate consideration was given, and if that should become a disputed question, the law allows proof to be made as to what the consideration really was.

Section 87g.—FORM OF BARGAIN AND SALE DEED.—The following is a form of bargain and sale deed:—

THIS INDENTURE, made the ..... day of ...., 190..., between ...., of the County of ....., State of California, the party of the first part, and ...., of the same place, the party of the second part, witnesseth:—

That the said party of the first part, for and in consideration of the sum of ..... Dollars, Gold Coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces, or parcels of land situate, lying, and being in the County of ....., State of California, and bounded and particularly described as follows, to-wit: .....

.....

(Here describe the land.)

.....

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

.....(Seal.)

STATE OF CALIFORNIA, } ss.
County of ..... }

On this ..... day of ....., A. D. one thousand nine hundred and ....., before me, ..., a Notary Public in and for said ..... County and State, residing therein, duly commissioned and sworn, personally appeared ...., known to me to be the person.. whose name.. ..... subscribed to, and who executed the within instrument, and ....., acknowledged to me that ..... executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the .... County of ....., the day and year in this certificate first above written.

.....
Notary Public in and for the ..... County of ....., State of California.

Commission expires ....., 19....

Section 87h.—QUITCLAIM DEED.—It may occur that the grantor has some interest in real estate, which he wishes to transfer, yet the interest is not so exactly ascertained as to be capable of definite description. In this event, it is usual to make a quitclaim deed, the grantor transferring all his right, title, or claim in or to the land, and relinquishing all his claim or right, whatever it may be, to his grantee.

Section 87i.—FORM OF QUITCLAIM DEED.—The following is a form of quitclaim deed:—

THIS INDENTURE, made the ..... day of ....., 190..., between ....., of the County of ....., State of California, the party of the first part, and ....., of the same place, the party of the second part, witnesseth:—

That the said party of the first part, for and in consideration of the sum of ..... Dollars, Gold Coin of the United States of America, to ..... in hand paid by

the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents does remise, release, and forever quitclaim, unto the said party of the second part, and to ..... heirs and assigns, all those certain lots, pieces, or parcels of land, situate, lying, and being in the County of ....., State of California, and bounded and particularly described as follows, to-wit: ....

.....

(Here describe land.)

.....

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, ... heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set ..... hand and seal the day and year first above written.

.....(Seal.)

STATE OF CALIFORNIA } ss.
County of ..... }

On this ..... day of ....., A. D. one thousand nine hundred and ....., before me, ...
....., a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the person.... whose name.. ..... subscribed to and who executed the within instrument and ..... acknowledged to me that ..... executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of ....., the day and year in this certificate first above written.

.....

Notary Public in and for the County of.....,
State of California.

Commission expires ....., 19....

Section 87j.—WARRANTY DEED.—The purchaser of real estate may insist upon an agreement on the part of

the seller to defend the title, to secure him in the possession, in the event of his possession being invaded or questioned by a third person after the sale. The parties to a sale of land may lawfully make an agreement whereby the seller will be bound to defend the title and possession in the purchaser. This agreement is evidenced by a warranty deed, conveying the property, and at the same time binding the seller to stand ready to defend the right of possession in the purchaser, should it be attacked.

Section 87k.—FORM OF WARRANTY DEED.—The following is a form of warranty deed:—

THIS INDENTURE, made the ..... day of ....., 190.., between ....., of the County of ....., State of California, the party of the first part, and ....., of the same place, the party of the second part, witnesseth:—

That the said party of the first part, for and in consideration of the sum of ..... Dollars, Gold Coin of the United States of America, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the said party of the second part, and to ..... heirs and assigns forever, all those certain lots, pieces, or parcels of land, situate, lying, and being in the County of ....., State of California, and bounded and particularly described as follows, to-wit: .....

.....

(Here describe land.)

.....

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, and to ..... heirs and assigns forever.

And the said party of the first part, and ..... heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, ... heirs, and assigns, against the said party of the first part, and his heirs, and against all and every person or persons whomsoever,

lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof the said party of the first part has hereunto set ..... hand and seal the day and year first above written.

.....(Seal.)

STATE OF CALIFORNIA, } ss.
County of ..... }

On this ..... day of ....., A. D. one thousand nine hundred and ....., before me, ..., a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the person.. whose name.. ..... subscribed to, and who executed the within instrument, and ..... acknowledged to me that ..... executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of ....., the day and year in this certificate first above written.

.....
Notary Public in and for the County of .....,
State of California.

Commission expires ....., 19....

Section 87kk.—CORPORATION DEED.—A deed may be made by a corporation, but the deed must be authorized by a resolution of the Board of Directors. When the Board of Directors of a corporation has passed a resolution directing the execution of a deed, the President may sign, execute, and deliver the deed for the corporation.

Section 87kkk.—FORM OF CORPORATION DEED AND ACKNOWLEDGMENT.—The following is a form of corporation deed, and the acknowledgment thereto. The acknowledgment is different from the acknowledgment to the deed of an individual, in that it must show the official capacity of the person executing it:

THIS INDENTURE, made the ..... day of ....., 190...., between .....,

a corporation duly authorized under the laws of the State of California, whose principal place of business is at ....., in the County of ....., State of California, party of the first part, and ...., of the same place, party of the second part, Witnesseth:

That, whereas, the said party of the first part is a corporation duly incorporated and existing under and by virtue of the laws of the State of California; and, whereas, in pursuance of the statutes in such cases made and provided, it has acquired and is the owner of the land and premises hereinafter described; and whereas, the Board of Directors of said corporation, duly assembled, on the ..... day of ....., duly passed the following resolutions, to-wit: .....

(Here insert in full the resolution adopted by the Board of Directors authorizing the sale of the land.)

.....

.....

.....

.....

Now, therefore, in pursuance of said resolution aforesaid, and in consideration of the sum of .... Dollars, gold coin of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part does by these presents grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns forever, all those certain lots, pieces, or parcels of land situate, lying, and being in the County of ....., State of California, and bounded and particularly described as follows, to-wit: .....

.....

(Here describe the land.)

.....

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part, by resolution of its Board of Directors, has caused

these presents to be subscribed by its President, and its corporate name and seal to be hereunto affixed, the day and year first above written.

.....(Seal.)
President.

STATE OF CALIFORNIA, } ss.
County of..... }

On this ..... day of ....., in the year 190..., before me, ..., a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the President of the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of ....., the day and year in this certificate first above written.

.....,
Notary Public in and for the County of
....., State of California.

Commission expires ....., 190.....

Section 87 l.—DEED IN ESCROW.—A deed may be deposited by the grantor with a third person, to be delivered to the grantee on performance of a condition, to take effect when the condition is performed. Thus, a deed deposited with a bank, to be delivered to the grantee upon the payment of so much money, or a deed placed in the hands of a third party, to be delivered to the grantee upon the death of the grantor, will take effect when the money is paid, or when the death of the grantor occurs. While in the possession of the third person, and subject to the condition, the deed is called an escrow.

Civil Code, Section 1057.

Section 87m.—EFFECT OF DEED IN ESCROW.—It often occurs that a person will make a deed in escrow, without sufficient knowledge of the effect of his act, and

when, if he knew the law, the deed would not have been made. Many people suppose that a deed can be made, and placed in the hands of a third person, to be delivered upon the death of the maker, and still be taken out of escrow at any time. But this is not the law. On the contrary, it is the law of California, that when the owner of land makes a deed, and delivers it to another, with instructions only to hold without recording until his death, and then to deliver it to the grantee, the grantor cannot recall the deed, nor alter its provisions, and he has no interest in the land left, except a life estate. His deed passes the title to the land at once to the grantee, qualified only by the right of the grantor to use and occupy the property, or take and receive the rents and profits, during his life. The person with whom such a deed is left in escrow has no right to give it back to the grantor, if the latter should change his mind about it. The act of the grantor, in making such a deed, delivered to a third person in escrow, is irrevocable by him, no matter how much he would like to take it back, or how deeply he may regret his act. (Decided by the Supreme Court of California, in the case of Bury vs. Young, which decision is printed in Volume 98 of the California Reports, page 446.)

Section 87n.—DEED CANNOT BE CANCELED.—If a deed is made, executed, and acknowledged, and delivered, but not recorded, the property cannot be transferred back by a redelivery of the deed, or by its cancellation. The grantee in such a case must make a deed back to the grantor, and both deeds must then be recorded.

Civil Code, Section 1058.

Section 87 nn.—POWER OF ATTORNEY TO MAKE DEED.—The owner of real estate may authorize another person to sell, and to make and execute a deed conveying his land, for and on his behalf. This authority he may delegate to another by means of a power of attorney. The

power of attorney must be executed and acknowledged in the same manner as a deed.

The following is a short form of power of attorney authorizing an agent to sell and convey real estate:

KNOW ALL MEN BY THESE PRESENTS, that I ....., of the County of ....., State of California, do hereby appoint ....., of the same place, my attorney in fact, for and in my name and stead, and on my behalf, to sell, receive the price thereof, and to make, execute, and deliver a deed therefor, all that certain piece, lot, or parcel of land, situate in the County of ....., State of California, particularly described as follows, to wit:

.....

(Here insert description of land.)

.....

for the price of ..... Dollars. Giving to my said attorney full power and authority for and in my name and behalf, to lawfully do whatsoever may be necessary and proper in the sale of said land and in the making, executing, and delivering of a deed of conveyance thereof, in my name and stead; hereby confirming and approving whatsoever my said attorney may lawfully do in and about the premises, as fully to all intents and purposes as though done in my own proper person.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ..... day of ....., 190..

.....(Seal.)

(Must be acknowledged in the same form as a deed.)

Installment Sales of Real Estate

Section 87 o.—SALES ON THE INSTALLMENT PLAN.—Real estate may be sold on the installment plan, the purchaser agreeing to make certain payments at stated times, the title to remain in the vendor until full payment is made. This is what is termed a conditional sale. The buyer may be let into the possession of the property, and yet the legal title will remain with the seller, if it is expressed in the agreement of sale that all installments must be paid before the title will pass or deed be given.

The agreement for sale of real property on the installment plan must be in writing, and the agreement should be recorded. If recorded, it is notice to the world that the grantee has a claim upon the land, and the right to obtain the legal title by making stipulated payments.

Section 87 p. — PAYMENT OF INSTALLMENTS.— Where the agreement provides that time shall be of the essence of the contract, and that payments shall be made in installments at specified times, it is essential that the purchaser pay each installment as it becomes due, if he wishes to keep the contract good. He must pay, for if he does not, the seller may rescind the contract and forfeit the payments already made.

Section 87q. — VENDOR'S REMEDY IF INSTALLMENTS ARE NOT PAID.—If the purchaser fails to pay any installment, when due, the seller may rescind the contract. He cannot do this arbitrarily, however, without regard to the rights of the purchaser. The seller should give reasonable notice to the purchaser, that the unpaid installment must be paid, or otherwise the contract will be rescinded and canceled and all prior payments forfeited. If, after receiving this notice, the purchaser still fails to pay the installment, the vendor may cancel the contract, retain the money already paid, and regain the possession of the property. If the purchaser is in possession of the property, and refuses to give it up, the vendor may bring a suit for ejectment, and the courts will put him into possession.

The vendor is not compelled to cancel the contract, however. For he may, on the contrary, sue the purchaser for the amount of each installment, as default is made in its payment, and get a judgment against him. The effect of this will be to enforce and maintain the contract of sale, and the judgment against the purchaser for the installments due can be collected out of his property.

Where there is an absolute agreement on the part of the purchaser, that, if payment is not made at the exact time stipulated therefor, all his rights thereunder shall be forfeited, the courts of California will enforce the contract as it finds it. The hardship of any case will not justify a court in setting aside the solemn agreement of the parties.

The vendor cannot wait until all the installments are due, before he takes action, and then expect the courts to enforce the contract as harshly as it may be drawn up between the parties. If he waits until all the installments are due, he must tender a deed of the land to the purchaser and demand payment of the installments due, if he wishes to enforce the contract. A vendor who waits until the last installment of the purchase price is due cannot sue the vendee for the unpaid purchase money without proof of performance, or readiness to perform, on his part; and the tender of a deed before suit is not alone sufficient, but the tender must be kept good during the court proceedings; the deed must be kept in readiness to deliver, should the vendee elect to pay up and receive the title.

The vendor may sue to compel the purchaser to carry out the contract, and the courts will give damages for failure to do so. The damages allowed will be the difference in the value of the land at the time of the suit and the contract price. The reason of this rule of damages is, the property may have increased in value, and thus the vendor may not be damaged at all, or may even be benefited, when he gets the property back.

Section 87r.—PURCHASER'S REMEDY IF VENDOR FAILS TO FULFIL CONTRACT.—It may happen that the vendor, when the time comes when he should make a deed conveying the title to the purchaser, is unable to do so. He may have been mistaken as to his own title, or some other circumstance may render it impossible for the vendor to meet his obligation, so that he cannot convey a title to the land to the purchaser. In such case, the law is, the purchaser may sue the vendor, and recover back

the money he has paid, with interest thereon. If the purchaser has been in possession, and has made improvements on the land, the value of the improvements may also be recovered, if the vendor misrepresented the facts and thereby induced the purchaser to buy.

Section 87s.—FORM OF INSTALLMENT AGREEMENT FOR SALE OF REAL ESTATE.—The following is a form of installment contract for the sale of real estate:

This Agreement, made and entered into on the ..... day of ....., in the year of our Lord one thousand nine hundred and ....., between ...., of the County of ....., State of California, the party of the first part, and ....., of the same place, the party of the second part, witnesseth:

That the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part, hereinafter contained, agrees to sell and convey unto the said party of the second part, and said second party agrees to buy, all that certain lot and parcel of land situate in the County of ....., State of California, bounded and described as follows, to-wit: .....

(Here insert description of land.)

.....

for the sum of ..... Dollars, lawful money of the United States, to be paid in the manner following, to-wit: ..... Dollars on the execution of this contract, the receipt whereof is hereby acknowledged, and the remainder in monthly installments of .... Dollars, payable on the first day of each and every month thereafter, until the whole of said purchase price shall have been paid, together with interest on deferred payments at the rate of ..... per cent per annum from date until paid.

And the said party of the second part agrees to pay all State, City, and County taxes, or assessments of whatsoever nature, which are or may become due on the premises above described.

In the event of a failure to pay the said installments, or any of them, by the party of the second part, as said

installments or installment shall become due, the said party of the first part shall be released from all obligation in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto, and all payments theretofore made by said party of the second part shall be thereby forfeited to the party of the first part.

Time is the essence of this contract.

And the said party of the first part, on receiving such payments, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying the title to said property herein described, free and clear of incumbrances.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties hereto, and that said party of the second part is to be let into and have immediate possession of said premises.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

.....(Seal.)

.....(Seal.)

(If the above agreement is intended to be recorded, it must be acknowledged.)

Employer and Employee

Section 88.—CONTRACT OF EMPLOYMENT.—The contract of employment is one by which a person, called an employer, engages another, called an employee, to do something for a compensation. In such a contract there is always either an express agreement or an implied agreement to pay a compensation for the services performed. If the agreement between the employer and the employee fixes the compensation, the law will not interfere with it; but if there is a contract of employment, and no rate of compensation is fixed by the parties, then the law will imply an obligation on the part of the employer to pay what the services performed by the employee were reasonably worth.

Section 89.—OBLIGATIONS OF THE EMPLOYER. —It may be stated generally of the obligations of the employer, which he assumes towards the employee, by the contract or relation which they mutually enter into, that by the law of California the employer is bound to provide a safe place and safe appliances and machinery for the performance by the employee of his work; that the employer is bound to inform the employee of anything within his own knowledge which renders the place or appliances dangerous, or which increases the ordinary risks of the employment, and which knowledge is not equally open to the observation of the employee; that the employer is bound to use reasonable care and diligence in the selection of competent fellow-servants, and he will be liable to an employee for injuries sustained by reason of his negligence in hiring incompetent employees to work with him; that the employer must keep in safe condition the premises in which his employee works, and must use ordinary care in the inspection and repair of such premises, and in the inspection and repair of machinery and appliances used by him. Also, the law provides that the employer must indemnify his employee for all that he necessarily expends or loses in direct consequence of the discharge of his duties or in obedience to the directions of the employer, provided that an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed. And an employer must in all cases indemnify his employee for losses caused by the employer's want of ordinary care, provided that the employee's own negligence must not contribute to his own injury. It is the duty of the employer to inform his employee of latent defects, or extraordinary dangers or risks, connected with the service, of which the employer has knowledge, but which are unknown to the employee. If the employer does not inform the employee of such defects or dangers, he will be liable for damages if the employee is injured. (Decided by the Supreme Court

of California, in the case of Bone vs. Ophir Silver Mining Co., which decision is printed in Volume 86 of the Pacific Reporter, page 685.)

Section 89a.—LIABILITY FOR INJURY.—The legislature of 1907 passed a new law affecting the liability of employers for injury to employees. It provides that the employer shall be liable to his employee for personal injuries when the same result from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch-signal point, locomotive engine, or other appliance than that upon which the employee injured is employed, or who is charged with dispatching trains, or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment.

Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended, and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continued in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the

benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated; but no more than one action shall be brought for such recovery.

Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative of any right or remedy to which he is now entitled under the laws of this State.

Act of the Legislature, in effect March 6, 1907.

Section 90.—OBLIGATIONS OF THE EMPLOYEE.—The law imposes upon the employee the obligation of serving his employer in good faith, using ordinary care and diligence, and all the skill which he possesses, in serving his employer's interests during his employment. The employee must substantially comply with all the reasonable directions of his employer concerning the service on which he is engaged, except where it is impossible or unlawful for him to do so. Everything which the employee acquires by virtue of the employment belongs to the employer, except the compensation which is due to him from the employer. An employee must, on demand, render to his employer just accounts of all his transactions in the course of his employment, and must render such accounts as often as may be reasonable. An employee who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference. An employee who is guilty of gross negligence in the performance of his duties is liable to his employer for the damage thereby caused to him; and in such case the employer is only liable to the employee for the value of such services as are properly rendered.

Civil Code, Sections 1978, 1981, 1984, 1985, 1986, 1988, 1990.

Section 91.—TERMINATION OF EMPLOYMENT.—The employment may be terminated at any time by the mutual agreement of the parties. The employment is also terminated by the expiration of the term contracted for, or by the extinction of its subject, or by the death of the employee, or by the legal incapacity of the employee to act, as in the case where the employee becomes insane. An employment will also be terminated by notice of the death of the employer, and by notice of his legal incapacity to contract; but there is an exception to this rule in cases where the employee has an interest in the subject of the employment, as where, by the terms of the contract of employment, the employee is to have a part ownership of the thing upon which he is employed. An employment having no specified term may be ended at the will of either party, on notice to the other. The employer may discharge the employee for any wilful breach of duty by him in the course of his employment, or in case of the habitual neglect of his duty by the employee, or long-continued incapacity to do his work; and the employee may quit the service of his employer, even though he has contracted for a specified term, where the employer is guilty of any wilful or permanent breach of his obligations to the employee, as where the employer fails to provide a safe place to work or safe appliances or competent fellow-servants, or in any other way wilfully fails to keep the obligations which the law or his own contract enjoins upon him for the benefit of the employee. An employee, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract. An employee who quits the service of the employer for good cause is entitled to a proportionate payment of the compensation which he would have received under a full performance of the contract, as compared with the portion of the services already performed by him.

Civil Code Sections 1996, 1997, 1999, 2000, 2001, 2002, 2003.

Section 91a.—SANITARY CONDITION OF WORKSHOPS.—Factories and workshops must be kept in good sanitary condition. Where dust, filaments, or injurious gases are produced or generated, exhaust fans or blowers must be used, with pipes and hoods extending to each machine.

Act of the Legislature, approved February 22, 1909.

Section 91b.—EMPLOYMENT OF CHILDREN.—No minor under the age of sixteen shall be employed in any mercantile institution, office, laundry, factory, workshop, place of amusement, restaurant, hotel, or apartment house, or to distribute or carry messages or merchandise between the hours of 10 o'clock in the evening and 6 o'clock in the morning; and no child under fourteen years of age shall be employed in such places at all.

The Judge of the Juvenile Court can issue a permit to work to a child over the age of twelve years, upon the sworn statement of a parent showing that he is ill and the child's labor is needed for support. Children over the age of twelve years may also be employed during the regular school vacations, upon a written permit signed by the school principal.

Every person, firm, or corporation employing minors under eighteen years of age, in any manufacturing establishment, shall post, and keep posted, in a conspicuous place in every room where such help is employed, a written or printed notice stating the number of hours per day for each day of the week required of such persons.

Act of the Legislature, approved March 15, 1909.

Section 91c. — EMPLOYMENT AGENTS. — Employment agents must procure a license from the Commissioner of the Bureau of Labor Statistics, and must pay therefor, in cities of the first class, first and one-half class, and second class, an annual fee of fifty dollars; in cities of the third and fourth classes, an annual fee of twenty-five dollars; and

in all other cities and towns, an annual fee of six dollars. Branch employment agencies must each have a separate license. The license must be posted in a conspicuous place on the premises. The license is good from the date of issuing to the 31st day of March following.

Act of the Legislature, approved March 6, 1909 (in effect on and after April 1, 1909).

Master and Servant

Section 92.—WHO IS A SERVANT.—There is a kind of employment which is distinguished under the head of "Master and Servant," in the law of California, as in the law of other countries. The term applies particularly to one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master. The word "servant" is not confined by our law to persons who are in domestic service, but it includes all who are entirely under the direction and control of the employer, with no independent choice or business of their own, in rendering of personal services of any kind.

Section 93.—TERM OF HIRING.—A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece-work, for no specified term. Custom in a particular employment or a particular place may change the case, but if there is no agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the services are performed. Where after the expiration of an agreement respecting wages and term of service, the parties continue the relation of master and servant, they are presumed to

have renewed the agreement for the same wages and term. The Bank of Suisun employed a bookkeeper, for the year 1898, at an annual salary of $1,200, payable monthly, and he continued in that employment during the first two months of 1899. He was then discharged, and he sued the bank for $1,000, the balance of his salary for the year. There was a judgment of the Superior Court for the amount against the bank, and the Supreme Court decided the case against the bank, saying: "The presumption arises that the employment was renewed for the same wages and term as for the previous term." (Decided by the Supreme Court of California in the case of Gabriel vs. Bank of Suisun, which decision is printed in Volume 28, California Decisions, page 720.)

Civil Code, Section 94.

Section 94.—WHEN SERVANT MAY BE DISCHARGED.—The law is that a master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not, if he is guilty of misconduct in the course of his service, or of gross immorality, though not connected with his service; or if, being employed about the person of the master or in a confidential position, the master discovers that the servant has been guilty of misconduct before or after the commencement of his services, of such a nature that the master, had he known or contemplated the facts, would not have employed him.

Civil Code, Section 2015.

Principal and Agent

Section 95.—DEFINITION OF AGENCY.—An agent is one who represents another, called the principal, in dealings with third persons. And as a great part of the business of all communities is transacted through the medium of agents, it is proposed in following sections to give the law of California applying to the relative rights and obligations of Principal and Agent in this State.

Section 96.—KINDS OF AGENCY.—There are two kinds of agents, special agents and general agents. An agent for a particular transaction is called a special agent, because he is appointed with special power to do that particular thing. A general agent, on the other hand, has a general authority conferred upon him to transact business of his principal, which includes more than one particular act. An agency, when it exists at all, is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another, who is not really employed by him, to be his agent.

Civil Code, Sections 2230, 2297, 2298, 2299.

Section 97.—AUTHORITY OF AGENT.—An agent has authority to do whatever his principal might do in the business for which he is employed. He has authority to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency. But he has only such authority as the principal confers upon him, and he will be limited in his authority to the particular business for which he is employed. Whatever he does within the scope of his employment, necessary or proper and usual, in the ordinary course of business, to effect the purpose of his agency, will be binding upon his principal. His declarations as to the subject of his agency, within the scope of his employment, will bind his principal; as where an agent employed to sell goods makes at the time a representation as to their quantity or quality.

Civil Code, Sections 2315, 2319, 2320.

Section 98.—WHAT INCLUDED IN AUTHORITY TO SELL PERSONAL PROPERTY.—An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

Civil Code, Section 2323.

Section 99.—WHAT INCLUDED IN AUTHORITY TO SELL REAL ESTATE.—An agent's authority to sell and convey real property includes authority to give the usual covenants of warranty.

Civil Code, Section 2324.

Section 100.—AUTHORITY OF AGENT TO RECEIVE PRICE OF PROPERTY.—A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price. A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterward. But neither a general nor a special agent to sell has any authority to receive anything but money in payment of the price of the thing sold. Therefore, if the agent sells property of his principal, and accepts part cash and part in something else, the principal will not be bound.

Civil Code, Sections 2325, 2326.

Section 101.—AGENT'S POWER TO DISOBEY INSTRUCTIONS.—An agent has power to disobey his instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, when there is not time to communicate with the principal. The general rule is, that an agent must follow and adhere to the instructions and authority he has received from his principal, but under some circumstances he may depart from his instructions, and the law will justify him, and his principal will be bound. So where, from the necessities of the case, without the agent's fault or neglect, some sudden and unexpected emergency or extraordinary or supervening necessity arises, or some unforeseen event happens, which will not admit of delay for consultation or communication with the principal, if the agent, exercising prudence and sound discretion, in good faith adopts the course which seems best to him, under all the circumstances as they exist, he will be justified, and his acts will bind his principal, though subsequent

events may demonstrate that some other course would have been the better.

Section 102.—AGENT CANNOT HAVE AUTHORITY TO DEFRAUD PRINCIPAL.—An agent can never have authority to do any act which is a fraud upon the principal, and is known or suspected by the person with whom he deals to be fraudulent. The agent must act in good faith with his principal, and if he enters into collusion with another to obtain an advantage over his principal, or to obtain the property of the principal for less than it is worth, the courts of this State will be ready to give the principal relief against both, by restoring to him the property of which he has been defrauded, or, if this cannot be done, by giving him damages as compensation. Many illustrations might be given. Where an agent invests money belonging to his principal for the purchase of an interest in a syndicate, of which the agent is a member, and in which he holds an interest, and which is indebted in a large amount, and, to induce the investment, leads the principal to believe that he is not a member of the syndicate, or interested therein, and represents that the principal will not have any calls to pay upon becoming a member thereof, the law imputes fraud on the part of the agent, and the principal may avoid the transaction and recover from the agent the amount so invested. So, it is the law of this State, that an agent must not unite his personal and his representative characters in the same transaction; for the law will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests will conflict with the interests of his principal. In dealing without the intervention of his principal, if an agent for the purpose of selling property of the principal purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable, and will always be set aside at the option of the principal.

Civil Code, Section 2306.

Section 103.—AGENT'S ACTUAL AUTHORITY.—The actual authority of an agent is such as a principal intentionally confers upon him, or intentionally or by want of ordinary care allows the agent to believe himself to be possessed of. An agent's authority is actual when there is a contract of employment existing between him and the principal. The principal may have given the agent instructions to act in a certain way; or a course of dealings or other circumstances between them may have been such as to lead the agent to believe that his authority from the principal extended to the things done; or the principal may have stood by and without objection witnessed the conduct of the agent, and thus made the agent believe that his authority from the principal was sufficient to warrant the acts done by him; and in all such cases the agent will be deemed to have had authority actually given him by the principal.

Civil Code, Sections 2299, 2316.

Section 104.—AGENT'S OSTENSIBLE AUTHORITY.—The ostensible authority of an agent is such as the principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent possesses. There are two essential features of an ostensible authority; the third party must believe that the agent has authority; and such belief must be generated in his mind by some act or neglect of the person whom he seeks to hold liable as principal. A belief founded on the agent's statement is not sufficient; for a party has no right to take the agent's word for the existence of his authority. But where the agent shows letters or telegrams, which are worded so as to lead a reasonable man to believe that he has received authority from the principal to act for him in a certain way; or where the principal has been in the habit of receiving money, for shipments of products or goods, through the same agent, in similar transactions; or where the principal has been in the habit of honoring drafts signed by the same

person as his "agent"; or where similar transactions have occurred in which the acts of the alleged agent were authorized or ratified; in all such cases, if the third party knows of the former transactions, and has received no notice that the principal will not be responsible, he will be justified in believing that the agent has authority, and the principal will be bound, even though the person for whom the agent assumes to act may not have intended to hold him out as such agent. On the other hand, a principal is bound by acts of his agent, under merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability or parted with value upon the faith of it. Therefore, if there is anything in the circumstances of a transaction, or in the conduct of one who represents himself as agent, which ought to excite the suspicions or stimulate the inquiry of a reasonable man, and the means of inquiry are open to him, and he neglects to make such inquiry or investigation as a reasonable man under the circumstances should be expected to make, the principal will not be liable for the acts of one who has no actual authority as agent to act for him. The statements of the agent himself do not prove the agency. And one who deals with another, upon his mere statement that he is the agent of a third person, takes upon himself the risk of being able to show, if a dispute occurs, that such agency really existed. He cannot hold the third person as a principal, under such circumstances, unless he can produce proof of the agency aside from the agent's own statements. (Decided by the California Court of Appeals, in the case of Apler vs. Tormey, which decision is printed in Volume 85 of the Pacific Reporter, page 661.)

Civil Code, Sections 2300, 2334.

Section 105.—RATIFICATION OF AGENT'S ACTS.— A person may ratify the acts of another, done for him as his pretended agent, and so make himself liable, though he had given the agent no authority before the act was done.

This ratification may be in many ways. It may be directly, by notice to the party with whom the agent has dealt; or it may be by receiving and retaining the fruits of the agent's acts; or it may be by silence and failure to object after being fully informed of the facts, for if one is fully informed of a contract made by another in his name, and by virtue of pretended authority from him, and remains silent and does not repudiate the contract within a reasonable time, he is presumed to give his consent and acquiescence to the contract. But a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified; so where the contract made by the agent was one which the law requires to be in writing, the ratification of the agent's act must also be in writing.

Civil Code, Section 2310

Section 106.—HOW AGENCY IS CREATED.—An agency may be created by authority given before the act done, and its creation will be presumed from a subsequent ratification. The authority conferred upon an agent may be verbal, and it will be sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

Civil Code, Sections 2307, 2309.

Section 107.—MUTUAL OBLIGATIONS OF PRINCIPAL AND THIRD PERSONS.—An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal. And the principal is liable, even if the agent exceeds his instructions, where the party with whom he deals is not aware of it. In either case, the question of the authority of the agent must depend, so far as it involves the rights of innocent third persons who have

relied thereon, upon the character bestowed, and not upon the instruction given. Or, in other words, the principal is bound to third persons who have relied thereon in good faith, and in ignorance of any limitations or restrictions, by the apparent authority he has given to the agent, and not by the actual or express authority, where that differs from the apparent; and this, too, whether the agency be a general or special one.

As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought in good faith and the exercise of ordinary care and diligence to communicate to the other. Notice to the agent of a corporation is notice to the corporation itself.

An instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself.

A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent as a part of the transaction of such business, and for the agent's wilful omission to fulfil the obligations of the principal.

Sometimes a person deals with a man without knowing or having reason to believe that he is not acting for himself, but is really only the agent for another. In such cases, where the fact is afterwards disclosed that another is the principal, and the principal makes a claim arising out of the contract, the party who dealt with the agent may set off against the principal all claims which he might have set off against the agent before receiving notice that he was an agent.

An undisclosed principal will be liable when he becomes known, upon a contract made by the agent in his own name. Where a party sells goods to one who afterwards turns out to have been the agent of another, and the principal receives the benefit of the transactions, the principal will be held responsible for the goods furnished the agent.

But the statute of this State provides, that if exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment made to the agent in good faith, before receiving notice of the creditor's election to hold the principal responsible.

Civil Code, Sections 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338.

Section 108. — OBLIGATIONS OF AGENTS TO THIRD PERSONS.—One who assumes to act as an agent thereby warrants to all who deal with him in that capacity, that he has the authority which he assumes. And if one acts as an agent, without authority, the party injured may sue him for the breach of the warranty and recover his losses.

If, with the agent's consent, credit is given to him personally in a transaction, he will be responsible as a principal to third persons. He will also be personally responsible, whenever he enters into a contract in the name of his principal, without believing, in good faith, that he has authority to do so. He will also be responsible when his acts are wrongful in their nature. If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of the demand, on being indemnified for any advances which he has made to his principal, in good faith, on account of the same; and he is responsible therefor, if, after notice from the owner, he delivers it to his principal.

Civil Code, Sections 2342, 2343, 2344.

Section 109. — AGENT'S DELEGATION OF HIS POWER.—An agent, unless specially forbidden by his principal to do so, can delegate his power to another person in any of the following cases, and in no others: (1) When the act to be done is purely mechanical; (2) when it is

such as the agent cannot himself, and the sub-agent can, lawfully perform; (3) when it is the usage of the place to delegate such powers; or, (4) when such delegation is specially authorized by the principal.

A sub-agent represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the sub-agent. Of course, if the agent should without lawful authority appoint a sub-agent, he would be responsible to third persons for such sub-agent's acts.

Civil Code, Sections 2349, 2351.

Section 110.—TERMINATION OF AGENCY.—An agency is terminated, as to every person having notice, by the expiration of its term. It is also terminated by the extinction of its subject, as where an agent to sell certain goods disposes of all of them, or where the subject of the agency is lost or destroyed so that nothing more can be done about it. It is also terminated by the death of the agent. It is also terminated by the agent's renunciation of the agency. It is also terminated by the incapacity of the agent to act as such, as where the agent becomes insane, or from some other cause it becomes impossible for the agent to perform his duties. It is also terminated when revoked by the principal, or by the principal's death, or by the principal's incapacity to act; but there is an exception to the rule that an agency is thus terminated because of the revocation by death or incapacity of the principal, in cases where the agent has acquired from his principal an interest in the thing which is the subject of the agency; for such an interest may survive all of these events, and be binding upon the principal's heirs, administrators, and executors, so as to continue the agency in existence. The interest which will keep alive the agency, under such conditions, must not be a mere lien for compensation or commissions, but must be an interest in the property or other subject of the agency.

Civil Code, Sections 2355, 2356.

Wholesaler's Agents

Section 111.—TRAVELING AGENTS.—In modern business enterprise the employment of traveling agents by wholesale houses is adopted as one of the necessary means of obtaining or keeping trade. The same ordinary rules which apply to the agents of other men apply to the agents employed by wholesalers, except when varied by custom or usage in a particular business or locality.

Section 112.—SALE BY SAMPLE.—The agent of a wholesaler who carries samples with him, when he exhibits the samples to the customer, and solicits his order for the goods, warrants that the bulk will be equal to that of the sample. This is absolutely necessary as a rule of law, as well as the custom among merchants.

Section 113.—PURCHASER'S RIGHT TO RETURN GOODS.—The purchaser of goods sold by sample has a right to make reasonable inspection of the goods, and if the bulk is not equal to the sample, he may repudiate the sale and return the goods. But his inspection and objection must be reasonable. If he keeps the goods, unpacked and unopened, for a long time after he receives them, his inspection will not be reasonable; and if, after inspection, he uses a part of the goods himself, or disposes of a part to others, or delays in sending them back to the wholesaler, his right to avoid liability for the purchase price will be lost. He must act promptly in inspecting the goods, and must with equal promptness return them, if he does not wish to be held for them.

Section 114.—COLLECTIONS BY TRAVELING AGENT.—A commercial traveler who makes collections for his house cannot, without special authority from the house, accept anything but money from the debtor.

Section 115.—GIVING CREDIT.—A commercial traveler may sell goods on credit, where that is the usage or

custom of the place or business; and when a customer buys on credit from a wholesaler's agent, in accordance with a usage between them of long standing, and without notice of any change in the wholesaler's terms, the latter will be bound, even if he has instructed his agent to give no more credit.

Section 116.—DECLARATIONS OF WHOLESALER'S AGENT.—When a commercial traveler approaches a customer, with or without samples of his principal's goods, he stands in the place of the principal and acts for and in his behalf. As the principal's own declarations would bind him, if he were present, so the agent's declarations within the scope of his authority, made at the time of the sale, and relating to the goods, will be binding upon the principal. So, whatever the agent of a wholesaler who is sent out to sell the goods of his principal states, as to the quantity, or quality, or condition, or price, or the time and manner of shipment, or any other fact which is material to or an inducement for the sale, it will bind the principal as though he had made the representations in person.

Section 117.—NOTICE TO WHOLESALER'S AGENT.—Notice of a fact given to the agent is notice to the wholesaler. Therefore, if the purchaser gives notice to the agent of any fact with respect to the contract or the goods, it is notice to the wholesaler himself, and he will be bound by it.

Section 118.—FAILURE TO SHIP GOODS.—When a commercial agent solicits and receives an order for goods, and neglects to send the order to his house, or the principal refuses to honor the order, after receiving it, the wholesaler will be liable to the customer for all damages sustained by him, if the goods were ordered in good faith.

Section 119.—NOTICE BY WHOLESALER OF TERMINATION OF AGENCY.—A wholesaler must give notice to his customers of the termination of an agent's

authority, or he will be bound by the agent's contracts with persons from whom he has formerly solicited orders, even if made after the agent's authority has actually ceased. Where a wholesaler dismisses an agent from his employ, and revokes his authority to sell or buy, he must give notice to third parties with whom the agent has dealings; and if he does not give notice to third parties of his revocation of the agent's authority, or unless he does what he can to make the revocation as notorious and generally known to the world as was the fact of the agency, he will be bound by the further dealings of the agent with persons who have not received notice of the agent's dismissal. As to the method of giving notice that an agent's authority has been revoked, or as to the character of notice required, the law does not prescribe any particular form of notice or method of giving it. Much will depend, in this matter, upon the prevailing custom or usage. Sometimes the notice is given by publishing in a newspaper, but more often by circular letter mailed to each of the wholesaler's customers. The latter method is to be preferred; for the wholesaler's books will usually show the names and addresses of all persons with whom the agent has had dealings, and a notice by mail may more surely reach the person intended to be notified of the revocation of an agent's authority. But whatever may be the method pursued, it must not be forgotten that actual notice of an agent's dismissal is necessary to protect his former principal from being bound by the agent's further dealing with persons with whom he formerly dealt.

Section 120.—WHOLESALER'S REPUDIATION OF AGENCY.—Circumstances occur where the wholesaler will dispute the agency altogether, and seek to repudiate the acts of one who has assumed to represent him in a transaction. In such cases, if the wholesaler does anything himself to ratify the act of the assumed agent, or accepts the result of his services, or acknowledges in any way his capacity as agent for himself, he will be bound,

and his effort to repudiate the transaction will be of no avail. A repudiation of the act of one who assumes to act as agent, and whose agency is disputed, must be made promptly, as soon as the wholesaler learns of the pretended agency, and must be decisive and unequivocal. There was a case in Colusa County, which was passed upon by the Supreme Court of California in 1896, which illustrates very well the conduct which will bind a wholesaler, and what will not be considered a repudiation of an assumed agent's authority. A man named Willis, who represented himself as the agent of J. K. Armsby Co., San Francisco, made a contract with J. H. Pope, of Colusa County, for the purchase of a lot of green fruit. The contract was in writing, and was signed, "J. K. Armsby Company. By Frank W. Willis, Agent." Subsequently, and before the delivery of any fruit under the contract, Pope wrote to the J. K. Armsby Co. this letter: "Colusa, Cal., May 25, 1894. J. K. Armsby Co., San Francisco—Gentlemen: I have sold my green fruit to you, and have a contract signed to that effect, signed, 'J. K. Armsby Company,' by Frank Willis, as agent. Now, what I want to know, is F. W. Willis your agent for buying green fruit, and is the contract correct? Your immediate answer and oblige Yours truly, J. H Pope." On the next day Pope received from the general manager of the Company this letter: "San Francisco, May 26, 1894. John H. Pope, Esq., Colusa, Cal.—Dear Sir: We have yours of the 25th. Mr. Willis bought some apricots on our advice, but we are not aware he bought them in our name. We will handle them, however, and think there is no question on the money part of the transaction. The writer expects to visit your section within the next week or two, and will arrange the matter satisfactorily with you then. Yours truly, J. K. Armsby Co. Freeman." Afterwards a dispute arose, and the J. K. Armsby Company denied that Willis was their agent for buying the fruit, and claimed to have repudiated his agency. But the Supreme Court reviewed the facts, and

said that the letter from the Company was not frank, and did not answer the question put by Pope, whether Willis was the Company's agent in the premises, by saying, in terms, whether he was or was not such agent; that the language used in the letter, and the assurances conveyed by it, authorized but one inference, that the contract was all right and the Company would see it carried out. And the Supreme Court further said, that if the Company intended to repudiate the transaction, it was its duty to do so explicitly, and in such terms as to leave no room for doubt; and that Pope had a right to infer from the language of the letter that the contract made by Willis, instead of being repudiated, was in fact ratified by the J. K. Armsby Company; and that the Company was positively and plainly informed by Pope's letter that he had a written contract signed in its name, and it was clearly the duty of the Company, if it did not know the terms of the contract, to inform itself, before writing as it did, if it did not wish to be bound by the contract. It would have been a very easy thing to have asked Pope to send a copy of the contract, before replying to his letter; and not to have taken this simple precaution was negligence on the Company's part, and precluded it from denying the effect of its assurances to Pope, which induced the latter to proceed and deliver his fruit under what he had a right to suppose was a valid contract. The case just referred to, like a great many others of like character, exemplifies the rule that an attempted repudiation of agency, or the contract of an agent made in the name of the principal, must be unequivocal and plain and clear, and must leave no room for a contrary inference on the part of the person with whom the agent deals. (Decided by the Supreme Court of California in the case of Pope vs. Armsby Co., reported in Volume 111, California Reports, page 159.)

Manufacturer's Agents

Section 121.—MANUFACTURER'S AGENT TO BUY OR SELL.—The law which applies generally to agents is

also applicable to agents for manufacturers, whether such agents have the authority to buy raw material or to sell the finished product to the retailer. The agent for the manufacturer has such authority as his principal gives him, or such as may be reasonably inferred from a course of dealings with customers of which the manufacturer has knowledge and retains the benefits.

Section 122.—AGENT'S AUTHORITY TO BORROW MONEY.—Where a manufacturer establishes an agency in a city other than the place where the factory or the main office is located, the question sometimes arises as to what conditions or circumstances, if any, will justify the agent in borrowing money on his principal's account. The authority of an agent to borrow money for his principal may be expressly given, or it may be impliedly conferred upon him as an incident to the business which he undertakes to transact for his principal. When the power to borrow money is expressly given to an agent, the existence and extent of the power are, of course, to be determined by a construction of the instrument by which it is given. Where a general power to borrow money is expressly given, such power includes authority to give the lender the ordinary securities for the sum borrowed, such as bonds, notes, or collaterals. The power of an agent to borrow money on his principal's account may be implied, when the carrying on of the business intrusted to him absolutely requires the exercise of such power. An agent is presumed to have power to do whatever is necessary to effect the purposes of his agency. The necessity for borrowing money must, however, be shown, before the power to borrow can be inferred from the original employment of the agent. To justify this inference, the borrowing must be practically indispensable, and it is not sufficient that it was convenient, or advantageous, or more effectual for the transaction of the business provided for. Nor is a party dealing with an agent entitled to assume the

existence of any extraordinary state of facts, in order to bring the act of the agent within the scope of his apparent authority. Where it is absolutely necessary, in order to carry on the business with which the agent is intrusted, that he should borrow money on the credit of his principal, the authority to borrow will be implied. But a power given to an agent to draw or indorse checks, for and in the name of his principal, gives him no authority to overdraw his principal's account at the bank. Where the act of an agent, in borrowing money for his principal, was without original authority, the principal's ratification of the act cannot be inferred from the mere fact that the money borrowed went into the business of the principal or was beneficial or advantageous to him. But where an agent without original authority borrows money on behalf of his principal, and uses it in a manner advantageous to the principal, the ratification of the agent's act may be inferred from the silence of the principal after knowledge of all the facts, or from his promise to repay the money so borrowed.

Section 123.—**AGENT SELLING GOODS OUT OF MANUFACTURE.**—An agent authorized to sell new-pattern goods, to be manufactured, in addition to those that the principal has already manufactured, or is willing to manufacture, has no authority to sell old-pattern goods, which have ceased to be manufactured, and could not be manufactured except at a loss. The very sending of an agent out to sell carries with it the idea that he is expected by the manufacturer to sell to his advantage; and this being so, it cannot be said that because he is expressly authorized to sell manufactured goods, he is also authorized to sell those that have ceased to be manufactured, and could not be except at a loss. An agent who has authority to sell new-pattern goods, to be manufactured, cannot be said to have authority to sell what is not being manufactured and will not be by his principal, because to manufacture it would result in a loss, which is not the prevalent

idea in any business. A reasonable man would not believe that a manufacturer would carry out any such contract, or that he intended to authorize his agent to make it.

Section 124.—SELLING GOODS FOR ONE YEAR MADE IN ANOTHER.—The mere fact that one acts as agent of a manufacturer in one year, in the sale of goods manufactured for sale for that year, does not make him an ostensible agent for the sale of the goods for the next year, unless such goods are continued to be manufactured or are in stock, and the principal wishes to sell them.

Section 125.—LIMITATION OF AUTHORITY.—A letter from a manufacturing firm to a customer, to the effect that for the next year they had certain new patterns of goods, which they would be ready to submit to the inspection of the customer at the end of the month, and that "our Mr. W. will call on you early in January, and talk to you about handling the line for next year," only authorized the agent to sell the new patterns of goods which were in the process of manufacture, or were offered to be manufactured, and the customer could not recover damages for the failure of the manufacturer to deliver old patterns of goods which the latter had ceased to manufacture.

Section 126.—SALE OF PROPERTY WHEN MANUFACTURED.—An agent authorized to sell the property of his principal when manufactured, has no authority to sell before it is manufactured.

Commission Merchants

Section 127.—SELLING PROPERTY ON COMMISSION.—There is a common kind of agency exercised by commission merchants, who receive the property of others to sell on commission. But commission merchants, who usually have possession of the property itself, and receive, not a salary, but a part of the selling price as their

compensation, and usually receive few if any instructions from the consignor of property to be sold on commission, are to be considered from a peculiar point of view in many of their business relations.

Section 128.—INSURANCE OF CONSIGNED PROPERTY.—A commission merchant, unless he has received contrary instructions, has authority to insure property consigned to him uninsured.

Civil Code, Section 2368.

Section 129.—AUTHORITY TO SELL ON CREDIT.—Unless specially restricted to sales for cash, a commission merchant has authority to sell on credit any property intrusted to him for sale; but such authority does not extend to such things as it is customary to sell for cash. Therefore, even if he has not received any instructions to the contrary, a commission merchant will not have authority to sell on credit any commodity consigned to him for sale which it is the custom at the place where he does business to sell for cash.

Civil Code, Section 2368.

Section 130.—PLEDGE OF CONSIGNED PROPERTY.—A commission merchant has no power to pledge or mortgage property consigned to him, and cannot trade the consigned property for other property.

Civil Code, Section 2368.

Section 131.—AUTHORITY OF PARTNER OR SERVANT.—The partner or servant of a commission merchant may have the same authority to deal with the consigned property as he has, but he cannot delegate his authority to any person in an independent employment.

Civil Code, Section 2368.

Section 132.—INSTRUCTIONS FROM CONSIGNOR.—If a consignment of property is received by a commission

merchant, and the consignor at the same time sends certain instructions for him to follow, regarding any matter connected with the sale, it is the duty of the merchant to follow such instructions if possible, notwithstanding any advances he may have made to his principal upon the property consigned to him. But if he has an opportunity to sell at the market price, and the consignor forbids him to do so, he need not follow such instructions, unless his advances are repaid him; and if his advances are not repaid him, he may proceed to sell for his own reimbursement, after giving to the consignor reasonable notice of his intention to do so, and of the time and place of sale.

Civil Code, Section 2027.

Section 133.—CANNOT EXTEND CREDIT.—When property is sold by a commission merchant on credit, the sale must be made on such credit as is usual, but he has no power to extend the credit agreed upon.

Civil Code, Section 2028.

Section 134.—GUARANTY OF CERTAIN PRICE.—Where the commission merchant guarantees that the goods shall yield to the consignor a fixed price, he cannot by selling for less, or by deducting his commission, avoid his liability to make his returns to the consignor amount to the price agreed upon. The value of the goods, as it turns out to be, is not material. He has fixed his own liability, and his guaranty of a certain price, and his liability to the consignor for so much, becomes absolute whenever he makes a sale, whether for cash or upon credit.

Section 135.—INSTRUCTIONS TO "SELL ON ARRIVAL."—Where a consignment of property is made to a commission merchant, with instructions to "sell on arrival," the merchant is bound to follow the instructions and sell for the price the property will command, and if he does not do so, but holds the property and neglects to sell

on arrival, he will be liable for any losses sustained by the consignor occasioned by a fall in price. He cannot excuse himself by saying that the market was dull, for he had received his instructions, and it was his duty to sell, if the property might have been disposed of even at a reduced price. It was his duty to sell on arrival, no matter at what loss.

Section 136.—SPECIAL PROPERTY IN CONSIGNMENTS.—A commission merchant to whom goods have been consigned for sale, has a special property in the goods, by virtue of his position with relation to them. For many, if not for most purposes, he is treated as the owner of the goods. He has possession; he may sell and make shipments; he may collect the purchase price; and, in fact, he may deal with the property as though it were his own, in the absence of explicit instructions limiting his authority. And it follows, necessarily, that any limitation upon his general authority must be brought to the notice of those with whom he deals, or his principal will be bound, even though he should go outside his instructions.

Section 137.—IN WHOSE NAME INSURANCE MAY BE PUT.—Insurance on property, consigned to a commission merchant for sale, may be for the benefit and in the names of both merchant and consignor. The merchant is not bound to insure, unless he has received orders to do so; but he may insure, in his own name, or in the name and for the benefit of his principal.

Section 138.—RESPONSIBILITY OF PURCHASER.—It is the duty of a commission merchant who sells on credit to make strict inquiry as to the responsibility of the purchaser; and if he neglects to do so, and a loss occurs, he will be liable for it to his principal.

Section 139.—RIGHT TO COMMISSIONS.—If a commission merchant properly performs his duties, he will

always be entitled to his commission in such sum as has been agreed upon between himself and principal; and if there has been no agreement as to the amount of the commission, then for a reasonable amount, which may depend upon usage or custom. But if the merchant be guilty of gross misconduct, or if he perform his duties in such a negligent manner as to prevent any benefit to the principal, he will not be entitled to receive his commission. If expenses are occasioned by his own negligence, he cannot recover them; and he will not be entitled to the difference, when through his own negligence the proceeds of the sale are not equal to the expenses.

Section 140.—MAY SELL IN HIS OWN NAME.—Having a special property in goods consigned to his care, a commission merchant may sell in his own name; and when the purchaser pays him, the former is discharged from all liability to the real owner of the goods. Whenever the commission merchant sells in his own name, he may sue the purchaser in his own name for the price.

Section 141.—TAKING PROMISSORY NOTE IN PAYMENT.—When it is proper for a commission merchant to sell on credit, and he takes the promissory note of the purchaser in payment, payable to himself, he takes it in trust for his principal, and subject to his order.

Section 142.—LIEN OF COMMISSION MERCHANT.—Having possession of the goods, and a special property in them, the commission merchant has a lien upon them and their proceeds, and the securities received upon their sale, for his expenses and commissions, for his advances to his principal, and usually for the balance of his general account with his principal.

Section 143.—AUTHORITY AS GENERAL AGENT.—Where general authority is given to a commission merchant to buy and sell for the principal, he is considered as

a general agent, and his acts will be binding on his principal, even where he has violated his private instructions.

Section 144.—CARE TO BE TAKEN OF GOODS CONSIGNED.—A commission merchant is bound to keep the goods intrusted to him with the same care as a prudent man would bestow upon them, if they were his own. He must use ordinary diligence in the care and preservation of the property while it is in his hands; and for any loss occasioned by his neglect of his duty in this respect he will be personally liable to his principal.

Section 145.—MUST NOT MIX GOODS WITH ANOTHER'S.—A commission merchant has no right to mix the goods received from one person with the goods of another.

Section 146.—DUTY TO RENDER ACCOUNTS.—A commission merchant is bound to give the unbiased use of his own discretion and judgment to his principal, and he must keep and render to his principal true accounts of his transactions, and he must keep the principal informed of all facts material to his interests; and if losses occur through neglect of these duties, he will become personally responsible to the principal.

The Legislature of 1909 passed a law providing that "every commission merchant, broker, agent, factor, or consignee, who shall wilfully and corruptly make, or cause to be made to the principal or consignor, a false statement as to the price obtained for any property consigned or entrusted for sale, or as to the quality or quantity of any property so consigned or entrusted, or as to any expenditures made in connection therewith, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five hundred dollars and not less than two hundred dollars, or by imprisonment in the county jail

not exceeding six months and not less than ten days, or by both such fine and imprisonment."

Act of the Legislature, approved March 20, 1909.

Another law was passed relating to the duty of a commission merchant to render an account to the consignor, as follows:

"It is hereby made the duty of every commission merchant, broker, factor, or consignee, to whom any property is consigned or entrusted for sale, to make, when accounting therefor or subsequently, upon the written demand of his principal or consignor, a true written statement setting forth the name and address of the person or persons to whom a sale of the said property, or any portion thereof, was made, the quantity so sold to each purchaser, and the respective prices obtained therefor; provided, however, that unless separate written demand shall be made as to each consignment or shipment regarding which said statement is desired, prior to sale, it shall be sufficient to set forth in said statement only so many of said matters above enumerated as said commission merchant, broker, factor, or consignee may be able to obtain from the books of account kept by him; and that said statement shall not be required in case of cash sales where the amount of the transaction is less than fifty dollars. Any person violating the provisions of this section is guilty of a misdemeanor."

Act of the Legislature, approved April 22, 1909.

Real Estate Agents

Section 147.—EMPLOYMENT MUST BE IN WRITING.—The employment of a real estate agent, giving him authority to sell land for another, is required by the law of this State to be in writing. The contract or some memorandum of it must be in writing. The contract or memorandum need not state that the agent is to receive a commission for his service, but it must show in writing that the agent was employed.

Civil Code, Section 1624.

Section 148.—VERBAL CONTRACT INVALID.—A verbal contract for the sale of real property, made by an agent who has no written authority from another, is invalid. And if the agent without authority in writing allows an intending purchaser to take possession of the property, such possession will only be held at the will of the owner, who can bring an action for unlawful detainer against the party in possession. Verbal authority given by one to another, to contract with reference to his land, is in law no authority. (Decided by the Supreme Court of California in the case of Nason vs. Lingle, which decision is printed in Volume 27, California Decisions, page 970.)

Section 149.—WHEN LETTER NOT SUFFICIENT.—A letter from the owner of real estate is not sufficient to enable the agent to recover a commission, unless it is clearly seen that an employment was intended, from the language used in the letter itself. A real estate agent in Oakland received a letter which read as follows: "Walter E. Logan: Sir—If you can purchase N. W. corner of 13th and Frankiin streets, 75x100, for $42,000, I think we would be ready to purchase same by Monday next. J. C. McMullen." Logan sued for a commission, producing the above letter as evidence of his employment in writing. The District Court of Appeal decided that the letter was not a sufficient memorandum of employment, under the law. The Court says that it does not purport to be an employment of the plaintiff as a broker or agent for the purchase of the real estate, but is rather to be construed as merely a proposition to him to ascertain whether it could be purchased at the designated price. But whatever construction is to be given to its terms, inasmuch as the plaintiff did not purchase the property, or obtain from the owner an agreement for its sale which could be enforced by the defendant, the latter did not become liable to him for any service as broker or agent in the matter. It was his duty to procure from the owners and deliver to the defendant a valid contract

of sale which could be enforced by the defendant; or, if he could obtain from the owners a verbal agreement to make the sale, he should have brought the owners and the defendant together, thus giving the latter an opportunity to secure a written contract. The letter alone was not sufficient to show an employment of the agent, or to give him any right to commissions. (Decided by the District Court of Appeal, First District, in the case of Logan vs. McMullen, which decision is printed in Volume 87 of the Pacific Reporter, page 285.)

Section 150.—**DESCRIPTION OF LAND.**—A contract to employ a real estate agent need not describe the lands specifically, if the terms of the employment can be made definite without it. But where it was evidently intended to limit the employment to certain property, it must appear that the property sold is within the description. Thus, if a contract should describe the property generally, as "all my land in Mendocino County, California," it would be a valid contract of employment, as capable of being made certain, and applying generally to all the lands of the principal. But if enough appeared on the face of the contract to show that it was the intention that the agent should sell a particular tract or lot of land, the agent, in order to make a valid sale, would have to confine himself strictly to the land particularly described.

Section 151.—**RIGHT OF AGENT TO COMMISSIONS WHEN PROPERTY WITHDRAWN FROM SALE.**—Where the contract of employment provides that if the owner shall before the expiration of the contract withdraw the property from sale the agent will be entitled to his commissions, the agent is entitled to recover his commissions as a debt due from the owner, upon his withdrawing the property from sale within the time named in the contract. The owner who withdraws the property from sale will be liable for the commissions, even though the

agent has not found a purchaser for the property. For by his contract he gives the agent the opportunity to earn the commissions within a certain time; and if, during the term, he withdraws the property from sale, he thus deprives the agent of the benefit of the unexpired time, and may prevent his opportunity for making a sale.

Section 152.—**WHEN CONTRACT FULFILLED AND COMMISSION EARNED.**—A real estate agent is never entitled to commissions for unsuccessful efforts. When he undertakes to find a purchaser, the risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The agent may devote his time and labor and expend his money with ever so much devotion to the interest of his employer, and yet if he fails, if, without effecting an agreement or accomplishing a bargain, he abandons the effort, or if his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the effort which was staked upon success, and in such event it matters not that after his failure and the termination of his agency, what he has done proves of use and benefit to the principal. But, on the other hand, if an agent authorized to negotiate a sale produces, within the time limited by his contract, a purchaser, ready, willing, and able to purchase upon the terms stated in the contract, his service is completed and he is entitled to his commissions. He is entitled to his commissions, notwithstanding the owner backs out, and refuses to sell to the purchaser produced.

Section 153.—**WHAT IS SUFFICIENT AUTHORITY FROM CORPORATION.**—Where an individual gives authority to a real estate agent to sell his land, any writing, in any form, whether memorandum, agreement, or letter, or telegram, which expresses on its face the employment of the agent to sell, is a sufficient authorization. But in the case of a corporation the law is entirely different.

A corporation can only act by and through its officers, and a writing, though signed by its President, Cashier, or Secretary, or all three together, stating that a real estate agent had been employed to sell lands owned by the corporation, would not give any authority to the agent whatever. Corporations act by their officers, and the officers must transact their business in the manner provided by law, and in no other way. Therefore, a corporation which has land to sell, and wishes to employ an agent to make the sale, can only act upon the matter through its Board of Directors, when duly assembled, by a resolution duly passed and recorded. There must be a quorum of the Directors present, and a majority of the Board must vote in favor of the resolution to employ the agent, and the "aye" and "no" vote must be entered in the minutes. The agent should then be furnished with a copy of the resolution, which will be a sufficient indication of his authority. When the By-Laws of the corporation provide that notice to Directors of meetings of the Board be given in a certain manner, notice must be given strictly in accordance with the By-Laws, or the resolution passed will not be valid. It will make no difference that all the Directors, without the formality of a meeting, sign their names to a written authorization to the agent. Such a writing would be worthless. Under it the agent would have no legal authority to deal with the land. Under it, he could neither make a valid contract of sale, nor collect any commissions from the corporation for his services. The Directors, the President, the Secretary, the Cashier, the stockholders, no one of these has power, by virtue of his office or investment, to employ an agent to buy or sell for the corporation, nor have all together the power which neither has separately. The powers of a corporation must be exercised, and its property controlled, by its Board of Directors; the decision of the majority of the Directors, made when duly assembled, being valid as a corporate act. The Board must be duly assembled, and their transactions should be

recorded. The Directors when not acting as a Board have not the necessary power to employ an agent. The absence of a resolution of the Board renders any writing purporting to employ the agent, though signed by the Directors or other officers, illegal and invalid.

Civil Code, Sections 305, 308, 377.

Section 154.—RATIFICATION OF UNAUTHORIZED EMPLOYMENT BY CORPORATION.—Where an agent acts for a corporation, without having received proper authorization by resolution of the Board of Directors, the corporation may yet ratify the act of the agent in making a sale; provided, the ratification must be in the same form and manner as the original authorization should have been, that is, it must be by a resolution of the Board lawfully adopted.

Section 155.—OPTION TO AGENT TO SELL FOR COMMISSION ABOVE A FIXED PRICE.—The owner of land may lawfully make a contract authorizing real estate agents to sell the land for a special sum and agreeing to pay them a commission of whatever sum they realize above that amount. Such a contract is binding upon both parties. It confers an option upon the agents, and a sale by the agents under such a contract is, as the law regards it, a sale made by them in the capacity of vendors upon their own account, and not strictly for the account of the owner of the land. If the agents find a purchaser, under such a contract with the owner, and receive a deposit to bind the bargain, but the sale does not go through because a title insurance company will not insure the title to the land, the owner has no claim on the deposit, and the agents have a right to refund the money to the intending purchaser. Such option to real estate agents, with relation, also, to a deposit received upon a purchase which afterwards failed to go through, was the subject of a Supreme Court decision in this State, in a San Francisco case. C. H. Robinson and C. B. Hobson executed to the

real estate firm of Easton, Eldridge & Co. the following instrument: "We hereby authorize Easton & Eldridge, for us and within five days from date hereof, and until this authority is canceled in writing by us, to sell for the sum of $10,000—net dollars—the following described property situated in the City and County of San Francisco, State of California, to-wit: All of block 935, outside lands; and we will pay the said Easton & Eldridge a commission of all over said sum of $10,000, net, for which they may sell said property with our consent. Witness our hand and seal this twenty-fourth day of August, A. D. 1887, C. B. Hobson, C. H. Robinson." The real estate firm found a purchaser, receiving from him $1,050 as a deposit on the purchase price of $10,500, with 30 days allowed for search of title, and upon the condition that the Title Insurance Company would insure the title. The Title Insurance Company refused to insure the title, and Easton & Eldridge repaid the deposit to the purchaser. Then Hobson and Robinson commenced a suit against the agents for the deposit, claiming that the money was received for their account, and that the agents had no right to pay it back to the purchaser. The Supreme Court decided the case in favor of Easton, Eldridge & Co., the decision of the court stating, that the relation of the defendants to the plaintiffs was not that of a mere agent; that while their authority to sell the land was derived from the plaintiffs, yet the sale was to be made for their own account and benefit, as well as for that of their principals. By the terms of the authorization from their principals, Easton, Eldridge & Co. acquired such a right to a portion of the proceeds of sale as to enable them lawfully to make a contract of sale upon terms of their own choosing. The principals, in effect, said the Supreme Court, gave to Easton, Eldridge & Co. an option for five days to endeavor to sell the block of land for whatever sum they could obtain, and upon whatever terms they might make, provided they should receive therefor the sum of $10,000, and agreed that the agents should

have whatever sum they could realize above that amount. The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent, and a sale by the agents under such a contract was in the capacity of a vendor upon their own account, and not solely for the account of their principal. The agents were entitled to all the proceeds of the sale in excess of $10,000, and therefore they had the right to make the sale upon such terms as in their judgment would enable them to realize the highest price for the land. Upon a sale by them, the owners were entitled to the immediate payment of the $10,000, but the agents could sell the land either for cash or upon time, as they might choose, so long as the owners received their money, and the terms of sale made by the agents did not require any ratification by the owners. And upon the disapproval of the title by the Title Insurance Company, the Supreme Court decided, the purchaser had the right to demand, and these agents had the right to refund, the money that had been received by them as a deposit upon the sale. (Decided by the Supreme Court of California, in the case of Robinson vs. Easton, Eldridge & Co., reported in Volume 93 of California Reports, page 80.)

Section 156.—FAILURE OF SALE BY DEFECTIVE TITLE.—Where an agent is employed to sell land, the title to prove good or no sale, and he finds a purchaser, ready, able, and willing to buy upon the agreed terms, and the title proves to be defective, the agent is nevertheless entitled to his commissions. The failure of the sale by reason of the defective title is not the fault of the agent, but is the fault of the owner, and he must pay the agent's commissions.

Section 157.—FAILURE OF OWNER TO REMOVE DEFECTS.—Where real estate agents enter into a contract with an intending purchaser, acknowledging the

receipt of a deposit, and stipulating that the title is to prove good or no sale, in which case the deposit is to be returned, and such contract is ratified by the owner of the land, even though not in the first place authorized, the owner is bound by it; and if it appears that there is a defect in the title, it is the duty of the owner to remove the defect and perfect the title within the time limited by the contract, and if he does not do so, the purchaser will be discharged from his obligation, and will be entitled to the return of his money paid on deposit.

Section 158.—RATIFYING AUTHORITY OF BROKERS.—The owner may ratify by his subsequent conduct the unauthorized act of the brokers in stipulating that the title shall be good or no sale. The action of the owner of the land in agreeing to the contract of his brokers with the intending purchaser, and in accepting him as the purchaser of the property upon the terms of such contract, is a waiver of objection that the brokers exceeded their authority in providing in the contract that the title should prove good, or that there would be no sale. And in this case it is not necessary that such ratification shall be in writing as between the owner of the land and the brokers, as it relates to no interest in the land, in so far as it affects the brokers, but only to the owner's obligation to pay them their commission when earned.

Section 159.—WHAT IS GOOD TITLE.—A title to land, to be good, should be free from litigation, palpable defects, and grave doubts; and it should consist of both legal and equitable titles, and should be fairly ascertainable from the records. A perfect title is one that must be good and valid beyond all reasonable doubt. Whether the title in any particular case is good or not is a question which it is often difficult to determine, and one upon which lawyers and judges often disagree.

Section 160.—SALE BY OWNER.—A party who employs a real estate broker to sell his land may, notwithstanding, negotiate a sale himself; and if he does so without any agency of the broker, and before the latter has procured a purchaser, he is not liable to the agent for commissions. But, as already stated, the commission of a real estate agent is earned by finding a purchaser ready, willing, and able to enter into a valid contract for the purchase upon the terms fixed by the owner; and having introduced such a one to the owner, the agent cannot be deprived of his right to commissions by the owner negotiating a sale himself.

Section 161.—COMMISSIONS UPON SALE OR EXCHANGE BY OWNER.—Where by the terms of a contract for the sale of real estate through brokers, they are authorized to sell the property for the owners at any time within a year, and it is agreed that the commission shall be paid if the owners should withdraw the property from sale or effect a sale in any way during the year, the brokers are entitled to commissions upon sale or exchange of the land by the owners themselves, and need not show that they had procured or could have procured a purchaser within the time fixed in the contract. The sale or exchange of the land by the owner himself puts it beyond the power of the agent to thereafter make a sale, and this entitles the agent to the same commissions he would have earned if he had sold the land for the amount realized by the owners.

Section 162.—SALE BY OWNER THROUGH ANOTHER AGENT.—Where by the terms of an agreement conferring a sole agency for the sale of land, the principal agrees to pay to the agent the same commission as if he had procured a purchaser, if he should sell or agree to sell the land or part of it to any one in the twelve months next ensuing, an immediate obligation to pay the commission is created against the principal by virtue of the contract,

when the principal himself effects a sale through another agent within that period. The agent first appointed has an immediate right of action to recover his commissions. And the owner cannot deduct from the commissions agreed to be paid to his exclusive agent the amount of commissions paid by him to another agent for effecting a sale.

Section 163.—MISREPRESENTATION BY OWNER.—Where by means of a fraudulent misrepresentation of the principal that he had not sold the land, and had changed his intention as to selling it, the agent having an exclusive right of sale was induced to accept part payment of his commission in satisfaction of the obligation of the principal, he is entitled to rescind the agreement for satisfaction, and recover the full amount of commission which had previously matured in his behalf, by reason of a sale effected by the principal of which he was ignorant.

Section 164.—WHAT CONSTITUTES A SALE BY OWNER.—It is not necessary, in order to constitute a sale by the owner sufficient to entitle the agent to his commissions, that the owner should sell for cash, or upon the same terms the agent was authorized to effect, or that he should make a conveyance, or that a legal title should pass to his purchaser. In a case decided by the Supreme Court of California, Shainwald, Buckbee & Co. sued M. K. Cady for commissions on the sale of the townsite of Agua Caliente. In the written agreement given by Cady to the agents, authorizing them to find a purchaser, it was stipulated that if Cady himself made a sale of the property within the term of the agreement, the agents were to be allowed two per cent commissions upon the amount of such sale; Cady sold the land, partly on credit, and the purchaser afterwards failed to make stipulated payments, and surrendered the contract and delivered up possession of the land; and at the time when Shainwald, Buckbee & Co. sued Cady for their commissions, he had again possession

of the land. The Supreme Court decided that Shainwald, Buckbee & Co. were entitled to their commissions, because Cady had absolutely placed it out of their power to make a sale of the property at all. Cady had received a portion of the purchase price, and given up possession of the property; and although the purchaser failed to keep possession, and surrendered the contract, and turned the possession back to Cady, the Supreme Court said that a sale was consummated sufficient in law to make Cady liable to the agents under their agreement. (Decided by the Supreme Court of California in the case of Shainwald, Buckbee & Co. vs. M. K. Cady, reported in Volume 92, California Reports, page 83.)

Section 165.—LIABILITY OF AGENT UNDER CONTRACT TO SELL FOR SPECIFIED AMOUNT.—Where an agent accepts real property for sale, and binds himself in writing to sell the property within a certain time for a certain amount, and to accept all over that sum as his compensation, he makes himself absolutely liable to the owner. And if he fails to make a sale for the amount stated in his contract, within the term stipulated, the owner can sue him for damages. The owner will be entitled to recover from the agent as damages the difference between the actual market value of the land, at the end of the term within which it was to be sold, and the amount the agent bound himself to realize from it for the owner.

Section 166.—LIABILITY OF OWNER TO AUCTIONEER.—One representing himself as the owner of real estate, who employs an auctioneer to sell the same under an agreement that, in the event of a sale, the auctioneer shall receive for his services a percentage on the amount bid, cannot, after a sale by the auctioneer, avoid paying him for his services because the purchaser refuses to take the property, owing to a real or alleged defect in the title. The auctioneer in such case is entitled to

compensation for his services, unless there is a special agreement that it shall depend on the consummation of the sale.

Section 167.—WHAT AGENT MUST PROVE IN SUIT TO RECOVER COMMISSIONS.—Where an agent is compelled to sue for his commissions, for effecting a sale of real estate, to entitle him to judgment in his favor, he must show that he was employed by or on behalf of the owner to make the sale, and that his authority, or some note or memorandum thereof, was in writing, subscribed by the party to be charged, or by his authorized agent. And before an agent can be said to have earned his commission, it must also be shown that he produced a purchaser, who was ready and willing and able to make the purchase on terms satisfactory to his employer, and that he was the efficient agent or procuring cause of the sale. The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done, his right to commissions does not accrue. It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commission, even though he made efforts to sell the property, and first called it to the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault, or fraud of the owner.

Civil Code, Section 1624.

Section 168.—AGENT'S MISTAKE AS TO TITLE.—When the agent has received a deposit, and the purchaser afterwards claims that the title is not good and demands the deposit back, the agent, if he be a simple agent to sell, will take his own chances if he returns the deposit to the purchaser. For if the owner insists upon the purchaser

taking the lands, and litigation follows, and it is decided that the title to the land was in reality good, the agent will be compelled to pay the amount of the deposit to the owner, less his commissions, even though he has already returned the deposit to the purchaser; and he will not be protected by the fact that he obtained the opinion of an attorney, and acted upon it in good faith, that the title was not good, before returning the deposit. His liability for the deposit to his principal will depend upon the fact, whether the title was or was not good, and not upon what he or anybody else may have thought about it, and the only way to determine the matter definitely is by a judgment of a court.

Section 169.—REPUDIATION OF CONTRACT BY VENDOR.—Real estate agents may recover from their principal the commission agreed upon for a sale secured by them, if the proposed contract of sale was not beyond their authority, though the vendor refuses absolutely to consummate the purchase or to negotiate with reference to it. It is immaterial whether the power conferred upon real estate agents is to sell or merely to secure a purchaser, so far as their right to recover the agreed commission is concerned, if they comply with their part of the contract in procuring a purchaser, to whom the vendor refuses to convey.

Section 170.—TERMS OF PAYMENT, AND REFUSAL TO ACCEPT TENDER.—A contract between a vendor and a real estate agent, providing that the terms of payment are to be as buyer and seller may agree, does not impose upon the agent the duty of selling for cash, even if it be construed as reserving to the vendor the right to agree upon the terms in person; and there can be no reasonable objection to the terms of payment as a defense to the recovery of commissions, if when cash was tendered by the purchaser, no objection was made on account of the terms. When the vendor has refused to accept the tender

of the purchase money, and repudiated the contract made by his real estate agent with the purchaser, he cannot defend against the payment of commissions on the ground that the purchase money was not paid.

Section 171.—HUSBAND GIVING AGENT PROPERTY OF WIFE TO SELL.—Where a vendor gives to real estate agents the property of his wife to sell as his property, and describes it in the contract, and they procure a purchaser without knowledge that the title was not in the vendor, his want of title cannot affect their right to recover their commissions from him.

Section 172.—WHAT CONSTITUTES FINDING A PURCHASER.—To find a purchaser means more than to procure some one who will offer to negotiate for the purchase. It implies the production of one who is not only ready and willing to comply with the terms of the purchase, but who has also the present ability to consummate it, and to comply with all of its terms, and who is also willing and ready to do all the acts that may be required to make an actual purchase of the land. To produce one who makes an offer to purchase, and who is without means, or who is not in condition to comply with the terms of the sale, and against whom a claim for damages resulting from a failure to perform the contract of purchase could not be enforced, does not constitute the finding of a purchaser within the meaning of the law; and the mere statement by one who is produced that he is ready and willing to make the purchase, is not sufficient, for he must satisfy the owner that he has the ability to do so. Upon the production of such purchaser, if the transaction is not to be consummated by an immediate delivery of the deed and payment of the purchase price, the owner has the right to demand that a valid, enforceable contract for the purchase of the land shall be executed by him. The owner may, however, waive the execution of such

contract; as, if after the broker has introduced the purchaser to him, he himself assumes to prepare a contract, or to deal with the purchaser upon other terms, or accepts a verbal obligation from him.

Section 173.—**OWNER AND PURCHASER NEED NOT BE BROUGHT FACE TO FACE.**—It is not essential, to entitle the agent to his commissions, that he should bring the owner and the purchaser face to face. If the agent secures from the purchaser a valid contract, according to the terms of his agreement with his principal, and a deposit of money if required, and the purchaser is really ready, willing, and able to complete the purchase according to the terms proposed, the agent has performed his duty as fully as though the parties had been brought together in person.

Section 174.—**AMOUNT OF COMMISSIONS.**—The amount of compensation or commissions which a real estate agent shall receive will in all cases depend upon his contract with the owner, if the contract makes any provision in respect to it; and, in the absence of any agreement on the amount of commission, it will be measured by the value of the service rendered, and the agent will be entitled to a reasonable compensation, to be ascertained from all the circumstances.

Section 175.—**PREVENTION OF SALE BY OWNER.**—If the owner in fact has a good title, but goes to the purchaser, or to the purchaser's attorney, and makes representations for the purpose of defeating the sale, and makes the intended purchaser believe that the title is bad, and the latter refuses to proceed with the transaction in consequence, the broker is entitled to his commission.

Section 176.—**WHEN PURCHASER AND OWNER ARE NOT BROUGHT TOGETHER, PURCHASER MUST SIGN A WRITTEN CONTRACT.**—If the agent

does not produce the purchaser before the owner in person, ready and willing to enter into a contract, the purchaser must sign a written contract, and this written contract must be delivered by the agent to the owner. This important rule as to the duty of the agent was stated by the Supreme Court of California in a case where B. M. Gunn, a real estate broker, sued the Bank of California for commissions. The Superior Court of San Francisco decided that Gunn was entitled to commissions, but the Supreme Court set the judgment aside, and decided that upon the facts the broker was not entitled to commissions. Gunn had a contract with the bank, by which he was to sell certain property within a certain time for $41,000, and was to receive $1,000 as his commission for making the sale; he found one Keating, within the time, who was ready, able, and willing to purchase at the price of $41,000, but his agreement with Keating was oral only, and Keating signed nothing, although he orally agreed to buy for the price stated and paid $500 on account, and took a receipt signed by Gunn alone; the receipt recited that Keating was to have twenty days within which to examine the title to the property. On the same day Gunn sent to a Mr. Brown, who was acting for the bank in the matter, the following letter: "Dear Sir: I beg leave to inform you that I have this day sold the lot and improvements known as the Golden Gate Flour Mill Property for the sum of forty-one thousand dollars, less one thousand dollars commission, and have given purchaser twenty days to examine title to same. Please send me abstract and approval of sale, and oblige." This letter was returned by Brown with this endorsement: "I herewith approve above sale. The Bank of California. Thomas Brown." Keating refused to complete the sale, on account of a defect in the title. Keating was financially able to pay the price he orally agreed to pay for the land, but he signed no contract which bound him to complete the purchase in case the title to the land was perfect, and Gunn did not introduce him to Brown, or

inform Brown who was the purchaser referred to in his letter, and Brown did not learn the intended purchaser's name until about the time the title was rejected by Keating's attorney. In the suit brought by Gunn for the $1,000 commission, the Supreme Court held that, as Keating had not signed any contract, and had not been produced before Brown as the purchaser, Gunn had not "found a purchaser," as the law reads, and was not entitled to the commissions. And the Supreme Court, in its decision of the case, said: "The question here is, What is 'finding' or 'producing' a purchaser within the meaning of the law? Is it sufficient for a broker to merely find a person financially able, and who verbally agrees with him to purchase upon the terms of the vendor, and makes a deposit, but who neither signs a binding agreement to purchase upon the terms of the vendor, nor is produced before the vendor as a person ready and willing to enter into such a contract? It seems to us very clear that this question must be answered in the negative. The contract of the broker is to negotiate a sale, that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect; or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement. This contract on the part of the broker is complete, when he delivers or tenders to the owner a valid written contract, containing the terms of sale agreed on, signed by a party able to comply therewith, or able to answer in damages if he should fail to perform. This is all the agent can do, and when it is done he is entitled to his commissions. But the necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor and vendee together, and the latter is able and willing, and offers to complete the contract, provided the vendor will make the conveyance. In such a case the agent has done all that he can do, and if the vendor under such circumstances refuses to complete the sale, he nevertheless

will be compelled to pay the agent his commissions. The object of the vendor is to effect a sale of his property, and when the real estate broker produces a contract executed by a solvent purchaser, he is then entitled to pay for his services, whether the trade is finally consummated or not, because if the vendee refuses to take the property, the vendor holds the contract, which renders the vendee liable for all damages (including commissions paid by the vendor to the broker) for a failure to comply. The right of Gunn to the agreed compensation depends upon the performance of his contract to procure a purchaser, and as he did not do this, and defendant neither waived nor prevented such performance, he has not earned his commission." (Decided by the Supreme Court of California in the case of Gunn vs. Bank of California, reported in Volume 99, California Reports, page 349.)

Section 177.—WHEN OWNER MUST RETURN MONEY PAID ON CONTRACT.—A vendor under contract for the sale of land, who has received a part of the purchase price at the time of the execution of the contract, cannot rescind the contract on account of the non-payment of the balance of the purchase price on the day stipulated for in the agreement, without returning or offering to return to the vendee the money that he has received on account of the contract. When a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in default, may recover back installments of the purchase-money paid, less the actual damage to the vendor occasioned by his breach of the contract.

Section 178.—AGREEMENT BETWEEN AGENTS TO COOPERATE IN SELLING.—Real estate agents may cooperate in the selling of land, for a share of the commissions, and such agreement between themselves need not be in writing. The agreement will be sufficient, if made orally, and the courts will enforce it.

Section 179.—AUTHORITY TO SELL ON CREDIT.—When a real estate agent receives authority from the owner to sell land on credit, the time of credit specified in their agreement is the measure of the agent's authority. Where the agreement authorizes the agent to sell on credit, but does not specify the time of credit, the agent must use his discretion in the matter, and has authority to give the purchaser a reasonable credit; and the credit given, to be reasonable, must be such as is usual and customary on sales of real estate in the particular vicinity. There is no set rule as to what will be considered a reasonable credit, but the question must be determined from all the circumstances in each particular case.

Section 180.—POWER OF ATTORNEY TO AGENT TO MAKE DEED.—The question as to what is necessary in a power of attorney for the sale of land, to authorize the agent to execute and deliver a deed to the purchaser, must be determined in each case upon its own peculiar circumstances. As between the parties to the transaction, it is proper to consider their situation at the time of the execution of the power of attorney, and their intention is to be gathered from the words of the instrument, and all the circumstances under which it was written. A power of attorney for the sale of land is sufficient as between the parties to the transaction, whether properly acknowledged or recorded, or not, if it is otherwise valid.

Section 181.—RISK OF PURCHASER WHO TAKES LAWYER'S ADVICE AS TO TITLE.—A purchaser of land is not justified in refusing to accept a conveyance, and in demanding back a deposit paid by him on account of purchase-money, merely because of the opinion of his lawyer, though given in good faith, that the title is not safe, if the opinion is erroneous, and the record title is in fact perfect. The purchaser must take the risk of the soundness of the advice upon which he acts.

Section 182.—LIABILITY OF AUCTIONEER FOR DEPOSIT AT AUCTION SALE.—Although by the terms of an auction sale a deposit of a percentage of the cash payment with the auctioneer pending the examination of the title, which is warranted perfect, makes the auctioneer a stakeholder for the parties; yet when the title is shown to be perfect, the deposit then becomes, according to the terms of the sale, a portion of the cash payment, and the property of the owner of the land, less the charges and commissions of the auctioneer; and the auctioneer cannot thereafter return it to the purchaser except at his own risk.

Section 183.—AGENT'S KNOWLEDGE OF TITLE.—A real estate agent has nothing to do with the title or ownership of the property, and his knowledge as to the title, or the equitable estate of a third person therein, is of no consequence; and his right to the compensation contracted for does not in any way depend on the validity or invalidity of the owner's title to the property.

Section 184.—INTEREST ALLOWED BY LAW ON AGENT'S COMMISSIONS.—A demand for broker's commissions, which is capable of being made certain by computation, draws interest from the time when it became due.

Civil Code, Section 3287.

Section 185.—HOW AUTHORITY OF AGENT CAN BE EXTENDED.—When the term of a real estate agent's employment is about to expire, the authority of the agent cannot be extended by a verbal agreement. The extension of the term of his employment, like the original agreement, must be in writing.

Section 186.—COSTS IN SUIT FOR COMMISSIONS.—Where a real estate agent sues in the Superior Court for commissions, he will have to pay the costs of the court

—Clerk's fees, Sheriff's fees, Reporter's fees, jury fees—if the verdict in his favor be for less than $300. In other words, the agent must secure a judgment for at least $300, or he will not be entitled to costs. If the agent sues in the Justice Court, for less than $300, the judgment in his favor will carry the costs.

Code of Civil Procedure, Section 1022.

Section 187.—COMMISSIONS OUT OF PURCHASE-MONEY.—Where the agreement between the owner and the agent is, that the agent is to receive his commissions "out of the purchase-money," or "out of the first money received" on the sale, the agent will not be entitled to any commissions at all, if the sale does not go through. Under such a contract, the sale must be completed, and the money paid by the vendee, before the agent is entitled to commissions.

Section 188.—SELLING LAND ON SHARES.—Under an agreement between a land owner and a broker, whereby the latter is to sell the land for a share of the proceeds above the cost price and selling expenses after all the land is sold, the procuring of a purchaser for all the tract, who is accepted by the owner and with whom an executory contract is made, is a sufficient performance of the agreement to entitle the broker to his share of the profits.

Section 189.—PURCHASE BY AGENT FROM HIMSELF.—An agent or sub-agent employed to assist in the consummation of a sale of land is incapable of legally purchasing the property from himself without the knowledge of the principal, and such a purchase will always be set aside, at the option of the principal. The reason is, that the agent should not unite his personal and his representative characters in the same transaction; he cannot serve two masters; and the law will not permit him to be exposed to the temptation, or brought into a situation where his own

personal interests conflict with the interests of his principal, and with the duties which he owes to his principal. The fiduciary relations between a principal and his agent preclude the latter from having any interest in the subject-matter of his agency adverse to that of his principal. In the employment of an agent the principal bargains for his disinterested skill and diligence, and whenever the interests of the agent become antagonistic to those of his employer he violates his obligation by continuing to act in his behalf without disclosing that fact. A broker, who is employed by the owner to sell his property, is, by the mere fact of accepting such employment, precluded from acquiring an interest in the property he is employed to sell. He cannot act as such agent in making a sale either to himself or where he is interested in the purchase, and he is equally precluded from having a personal interest in the result of the sale of which his principal is ignorant. Whenever he has an interest in making the sale which is antagonistic to that of his principal, he is unable to discharge his full duty to the latter, and by continuing to act as his agent without disclosing to him the fact of such interest he commits a fraud upon him which will deprive him of all right to compensation for services. (Decided by the District Court of Appeal, in the case of Rauer's Law and Collection Co. vs. W. B. Bradbury, which decision is printed in Volume II of California Appellate Decisions, No. 86, page 377.)

Section 190.—PURCHASE BY AGENT FROM PRINCIPAL.—While an agent cannot purchase from himself, he may, where all the circumstances show fair dealing and good faith, purchase land from his principal, although it was placed in his hands to sell to others. There is no law against a purchase by an agent from his principal, where the facts are fully disclosed to the principal, and the agent acts in good faith, taking no advantage of his situation. The principal may, if he sees fit, deal with the agent as with any other person. The agent has the same right to

deal directly with his principal as has a stranger. And when the agent deals with his principal at arm's length, and after a full disclosure of all that he knows with respect to the property, the sale will be as valid as though the purchase had been made by a stranger.

Section 191.—AGENT BUYING IN HIS OWN NAME.—When the agent is employed by his principal to buy real estate, and uses the principal's money in making a purchase of land, but has the deed made in his own name, the law will not permit him to gain any advantage by the transaction. He will be held as a trustee for the principal, and will be compelled to convey the land to the principal.

Section 192.—WHEN AUTHORITY OF AGENT REVOCABLE.—Where a real estate agent has authority to sell land, if no time is stated within which the sale can be made, the authority is revocable at the will of the owner, at any time before it has been exercised.

Section 193.—WHICH ONE OF TWO BROKERS IS ENTITLED TO COMMISSIONS.—When two brokers have been employed by an owner, and one of them in fact names the property to the purchaser, and the purchaser negotiates solely with him and at his instance with the owner, the other broker is not entitled to commissions, notwithstanding he casually learns that such purchaser is considering the expediency of making the purchase, and therefore calls upon him and urges the purchase, and reports his name to the owner. Only the broker whose efforts were the procuring cause of the sale is entitled to the commissions from the principal.

Section 194.—AUTHORITY OF AGENT MAKING LEASE FOR TERM LONGER THAN ONE YEAR.—Where a real estate agent is authorized to lease land of his principal, he cannot make a lease for a term longer than

one year, unless his authority to make the lease is in writing. The authority of an agent to make a lease for a period in excess of one year must be in writing, and cannot be conferred by oral contract. A lease by an agent exceeding the term of one year cannot operate as a valid lease for one year, the agent's authority not being in writing. Where the owner of land, without knowledge of a lease made by an agent without authority, has rented the land to another, no power remains in him to ratify the previous unauthorized act of his agent.

Civil Code, Section 1624.

Section 195.—DEATH OF PRINCIPAL REVOKES AUTHORITY OF AGENT.—The death of the principal revokes the authority of the agent, except where the agent's authority is coupled with an interest in the land. In order that the agent's authority shall survive the death of his principal, it is necessary that such an interest or estate shall have passed to the agent as will entitle him to execute the authority to sell in his own name. Sometimes, the agent will hold a power of attorney, from which it can be seen that he has an interest in the land, and that it was the intention of his principal that the power should be irrevocable by death. But, whatever form the agent's written authority may be in, his right to commissions, or the principal's promise to pay commissions on the sale, will not of themselves be sufficient to create an agency which will survive the principal's death. The agent must have acquired by his power from the principal an interest in the land itself. What constitutes an interest in the land, sufficient for keeping alive an agent's authority after the principal's death, depends very much upon the circumstances of each particular case—so much so that illustrations of the rule here would not be of value.

Section 195a.—COMMISSIONS ON SALES OF REAL PROPERTY UNDER ORDER OF COURT.—In the

settlement of an estate, in any order of sale of real estate, or subsequent to making any such order, the court may authorize any executor or administrator to enter into a contract with any bona fide real estate agent to secure a purchaser, providing for the payment by the estate to said agent of a commission, the amount of which shall be specified, payable out of the proceeds of any such sale. If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract will be binding and valid as against the estate.

By the execution of any such contract no personal liability will attach to the executor or administrator, and no liability of any kind will be incurred by the estate unless an actual sale is made and confirmed by the court.

Act of the Legislature, approved March 10, 1909.

Section 195b.—PERSONAL PROPERTY BROKERS.—A personal property broker may charge, receive, and collect, for money loaned or advanced on personal property, secured by chattel mortgage, bill of sale, or other contract, or secured by an assignment or power of attorney respecting wages, salary, earnings or income, the sum of five per cent per month, and no more. If any larger amount is charged or collected, the entire contract will be void.

Act of the Legislature, approved April 16, 1909.

Fire Insurance Contracts

Section 196.—CONTRACT BETWEEN THE PARTIES.—Insurance against loss by fire constitutes one of the common and important contracts in the business of every community. In California the fire insurance business is carried on by corporations, nearly all having ample capital, and fully able to meet such losses as they are required to pay. Yet so many and so varied are the policies issued, and the circumstances and causes of fires and losses, and the claims and adjustments of claims after fires have

occurred, that it is not a matter for wonder that conflicts are continually arising between the insurer and the insured, over the terms and conditions of the contract and the rights and obligations of the parties. The Legislature has attempted in our statute law to fix the mutual obligations and liabilities of the parties to the contract of fire insurance, and the Supreme Court of California has in many decisions stated definite rules of construction which must be applied to the policies issued by insurance companies. The contract of insurance is generally defined by the statute of California as being a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event. Insurance against fire is a contract whereby the insurer becomes bound, for a definite premium or consideration, to indemnify the insured against loss or damage to the property named in the policy. The policy, and the conditions contained in it, fix the relations between the parties to the contract, and furnish the measure of their respective rights and liabilities.

Civil Code, Section 2527.

Section 197.—DESIGNATION OF PARTIES.—The party who issues the policy of fire insurance is called the insurer, and the party who is indemnified is called the insured.

Civil Code, Section 2538.

Section 198.—INSURABLE INTEREST.—Every interest in property, or relating to it, or liability in respect to it, of such a nature that a contemplated peril might directly injure the insured, is an insurable interest, in the law of California. The contract of insurance, being one of indemnity, the insured must have such an interest in the property as that its destruction will result in pecuniary loss to him. But it is not necessary he shall have a title, provided his interest, whatever it may be, is such that it

would be impaired or injured by the destruction of the property. Nor is it necessary that the interest of the insured be personal; for if he has an interest in the property as trustee, agent, mortgagee, commission merchant, common carrier, warehouseman, administrator, pledgee, lessor or lessee, consignee, or judgment creditor, the courts have held that this is an insurable interest. And it has been held that even one who has no title, legal or equitable, in the property, and no present possession or right of possession, has an insurable interest if he will derive benefit from the continued existence of the property, or will suffer loss by its destruction.

Civil Code, Section 2546.

Section 199.—MEASURE OF INTEREST IN PROPERTY.—The measure of an insurable interest in property is the extent to which the insured might be damaged by loss of or injury to the property. Therefore, under the provisions of our law, if the owner of a building insures it for more than it is worth, he will not be entitled to the full amount, merely because the company has issued a policy and accepted a premium on a fictitious value; but the amount the insurer will be liable to pay, in all cases, will be the amount, to the extent of the policy, necessary to reimburse the insured for the pecuniary loss he has sustained, unless the insurer has agreed in the policy that in case of loss the property shall be valued at a given sum. Where the interest of the insured is less than a whole ownership, as where he has an interest only as mortgagee, his insurable interest in the property is measured by the amount of the debt, and no more; and in fact, the insured can never be entitled to recover more than his actual loss.

Civil Code, Section 2550.

Section 200.—WHEN INSURABLE INTEREST MUST EXIST.—The law of California provides, that the interest insured must exist when the insurance takes effect,

and when the loss occurs, but need not exist between those two dates. The meaning of this is, that where the policy does not prohibit it, the insured may dispose of his interest in the insured property, after the policy has been issued, and if, before the term of the policy ends, he becomes again the owner of his interest in the property, and owns it at the time of the loss, he may recover on the policy. The interest of the party in the insurance is simply suspended, when he has disposed of the property without changing the policy to another, until the interest in the property and the interest in the insurance are again vested in himself. A change of interest in a thing insured, after the loss, does not affect the right of the insured to collect the insurance. Where a person holds a policy which includes several articles separately insured, and transfers some of the articles only, his insurance upon the articles not transferred is still good. A policy is not rendered invalid by the death of the insured; for his administrator will hold the policy for the benefit of those who succeed to his estate. The transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

Civil Code, Sections 2552, 2553, 2554, 2555, 2556, 2557.

Section 201.—INSURANCE WITHOUT INTEREST ILLEGAL.—The sole object of insurance is the indemnity of the insured, and if he has no insurable interest when the policy takes effect, the policy is void; and if he has no insurable interest when the loss occurs, he cannot collect the insurance.

Civil Code, Section 2551.

Section 202.—WAGER POLICIES VOID.—Every policy executed by way of gaming or wagering is void.

Civil Code, Section 2558.

Section 203.—DUTY OF PARTIES IN MAKING THE CONTRACT.—Each party to a contract of fire insurance, if they expect the policy to be free from attack, must deal fairly with one another, and must not be guilty of misrepresentation or concealment of material facts, upon entering into the contract. Insurance companies act usually, if not always, by agents sent out to solicit insurance, or by local agents residing in the locality where the property to be insured is situated. The company is bound by all the acts of such agents done within the scope of their authority. The insured may act for himself, or through a broker or other agent. But however the parties come together, the law requires the utmost good faith on the part of both. The law of California, recognizing this principle, provides that each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining; therefore, it is the duty of the company's agent to disclose fully to the insured all the conditions and requirements of the policy which his company proposes to issue, and it is the duty of the insured to communicate to the agent all facts within his knowledge respecting the situation or condition of the property; but neither party to a contract of insurance is bound to volunteer information of matters which the other knows, or which in the exercise of ordinary care the other ought to know, where there is no reason to suppose him ignorant of them; and neither party is bound to give information to the other of facts of which the other waives communication; and neither party is bound to give the other information of matters open to the inspection equally of both; except, that either party must answer the inquiries of the other, as to any fact affecting the insurance, though it would not have been necessary to say anything about it if no inquiry had been made. Where inquiries are made by either party of the other, he is bound to answer

truthfully and in good faith. Both parties will be responsible for any false representations made during the negotiations, and for any false representation on a material matter the policy will be rescinded. The law deems a representation false when the facts fail to correspond with its assertions or stipulations.

Civil Code, Sections 2563, 2564, 2566, 2579.

Section 204.—THE POLICY OF INSURANCE.—The written instrument in which a contract of insurance is set forth is called the policy of insurance. The policy is required by the law of California to specify, the parties between whom the contract is made, the rate of premium, the property insured, the interest of the insured in the property, if he is not the absolute owner, the risks insured against, and the period during which the insurance is to continue. When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy. To render an insurance effected by one partner or part owner applicable to the interest of his copartners or of other part owners, it is necessary that the terms of the policy should be made to apply to the joint or common interest. When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him. A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured. The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes the owner of both the policy and the thing insured.

Civil Code, Sections 2587, 2589, 2590, 2591, 2592, 2593.

Section 205.—OPEN AND VALUED POLICIES.—A policy is either open or valued. An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

Civil Code, Sections 2594, 2595, 2596.

Section 206.—RUNNING POLICY.—A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements. The general rule is that the property insured must be specified in the policy. But open or running policies are an exception to this rule. They were brought into use to enable merchants to insure their goods shipped at distant ports, when it is impossible for them to know the precise quantity or character of the goods, or the particular vessel in which they are shipped, and thus unable to describe accurately or particularly the subject of insurance. These policies generally, if not universally, require that the risk shall be declared or reported to the company as soon as known to the assured.

Civil Code, Section 2597.

Section 207.—ACKNOWLEDGMENT IN POLICY OF RECEIPT OF PREMIUM.—An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

Civil Code, Section 2598.

Section 208.—AGREEMENT NOT TO TRANSFER.—An agreement, made before a loss, not to transfer the claim of a person insured against by the insurer, after the loss has happened, is void.

Civil Code, Section 2599.

Section 209.—CERTAIN WARRANTIES.—A warranty is either expressed in the policy, or implied from circumstances. A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty of the fact. A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such act or omission shall take place; as that a watchman will be kept on the premises, or that a supply of water will be kept on the building ready for use.

Civil Code, Sections 2607, 2608.

Section 210.—WHAT ACTS AVOID POLICY.—The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind. A policy may declare that a violation of special provisions shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

Civil Code, Sections 2610, 2611.

Section 211.—EXONERATION OF INSURER.—An insurer is not liable for a loss caused by the wilful act of the insured; but the insurer is not exonerated by the mere negligence of the insured, or of his agents, or others.

Civil Code, Section 2629.

Section 211a.—PROXIMATE AND REMOTE CAUSE OF LOSS.—A new law was passed by the Legislature of 1907, which was intended to have some bearing upon suits for losses in the San Francisco fire. The language of the law is not clear, and it would probably be difficult for the legislator who prepared it to tell just what it was intended to mean. Such as it is, however, it is quoted below:—

"In an action to recover upon a contract of insurance wherein the defendant claims exemption from liability upon the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused

by or would not have occurred but for a peril excepted in the contract of insurance, the defendant shall in his answer set forth and specify the peril which was the proximate cause of the loss, in what manner the peril excepted contributed to the loss or itself caused the peril insured against, and if he claim that the peril excepted caused the peril insured against, he shall in his answer set forth and specify upon what premises or at what place the peril excepted caused the peril insured against.

"This Act shall apply to all pleadings filed after the passage of this Act, as well as actions then pending as in those thereafter begun." (In effect March 21, 1907.)

Section 212.—NOTICE OF LOSS.—In case of loss by fire, the insured must give notice to the company of the loss, without unnecessary delay. If the policy fix the time within which notice of loss must be given to the company, the insured must give notice within that time; if the policy does not fix the time, the insured must give notice of the loss within a reasonable time. The notice may be given to an agent of the company, or it may be sent to the office of the company, and it may be sent by the most available means, by mail, or in person. If the policy provides that the notice must be in writing, it must be so given, but verbal notice will be sufficient without such provision.

Civil Code, Section 2633.

Section 213.—PRELIMINARY PROOFS OF LOSS.—When preliminary proofs of loss are required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time. All defects in a notice of loss, or in preliminary proof of loss, which the insured might remedy, and which the insurer omits to specify to him without unnecessary delay as grounds of objection, are waived. Delay in the presentation to an insurer of notice or proof of loss is waived,

if caused by an act of the insurer, or if he omits to make objection promptly and specifically upon that ground. If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a Justice of the Peace, or other person, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just ground of disbelief in the facts necessary to be certified to.

Civil Code, Sections 2634, 2635, 2636, 2637.

Section 214.—DOUBLE INSURANCE.—A double insurance exists where the same interest in property is insured by several insurers separately. In cases of double insurance, the several companies must contribute ratably toward the loss, without regard to the dates of the several policies.

Civil Code, Section 2642.

Section 215.—ALTERATION INCREASING RISK.—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

Civil Code, Section 2753.

Section 216.—ALTERATION WHICH DOES NOT INCREASE RISK.—An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

Civil Code, Section 2754.

Section 217. — VERBAL CONTRACT TO ISSUE POLICY.—A verbal contract to issue a policy, made by the owner of the property and the agent of the company, is a valid agreement. Therefore, if the owner of a building applies to an agent, or if the agent solicits the insurance,

and a verbal agreement is made for a consideration that a policy will be issued for a certain amount covering the property, and the company then refuses to issue the policy, it will be liable for the loss, whether the policy is issued or not. If a fire occurs and destroys the property, the owner can sue the company for damages, for its failure to issue the policy, and recover his loss on the property, not exceeding the amount of insurance verbally agreed upon.

Section 218.—CERTIFICATE OF NOTARY.—Under a provision of a fire insurance policy requiring that in case of loss by fire the assured must obtain the certificate of the Notary nearest the insured building, not concerned in the loss as a creditor or otherwise, nor related to the assured, as to the justice of the claim, where it appears that the nearest Notary refused to act, on the ground that he was employed by the insurance company in ascertaining the facts and taking affidavits concerning the fire, the assured is relieved of the necessity of obtaining his certificate, and need not inform the company of the reason for obtaining the certificate of another Notary. (Decided by the Supreme Court in case of Noone vs. Transatlantic Fire Insurance Co., which decision is printed in Volume 88 of the California Reports, page 152.)

Section 219.—FALSITY OF MATERIAL REPRESENTATIONS BY INSURED.—One who makes an application for fire insurance must not make false representations, as to any material fact upon which the insurance depends, for if he does the company may cancel the policy. This the company may do by making a tender of the premium back to the insured, and notifying him that the policy is canceled on account of the false representation. And if the company, where a false representation has been really made, tenders the premium back and gives the insured notice of the cancellation of the policy, before the commencement of a suit on the policy, this will operate as a

rescission of the policy and will defeat the suit. As an illustration, it may be cited, that a condition in a policy of insurance upon a mill, that during such time as the mill is idle a watchman shall be employed by the insured "to be in and about the premises day and night," is broken if during the time the mill is idle but one watchman is employed, who was not instructed to watch the mill at night, and who slept every night in a building three or four hundred feet from the mill. A man employed to watch in the daytime, and who is permitted to sleep at night, is not a watchman at night. And to entitle the insured to recover upon such a policy it must be shown that he has in good faith employed a watchman to perform the duties required by the terms of the policy. (Decided by the Supreme Court in the case of Rankin vs. Amazon Insurance Co., which decision is printed in Volume 89 of the California Reports, page 203.)

Section 220.—STATEMENTS AS TO VALUATIONS.—A provision in the policy that the application shall be considered a warranty, and if the property is overvalued in it, the policy shall be void, applies only where the statements as to value are intentionally false.

If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense it would be to the insured, at the time of the commencement of the fire, to replace the thing lost or injured in the condition in which it was at the time of the injury.

Act of the Legislature, approved April 15, 1909.

Section 221.—RIGHTS OF MORTGAGEE—EFFECT OF SALE UNDER FORECLOSURE.—A mortgagee of insured property, to whom the loss is made payable, is entitled to recover the loss to the full extent of the mortgage debt, although the fire occurs after a foreclosure sale and purchase by the mortgagee, but before the time for redemption has expired and before the execution of a

sheriff's deed to the mortgagee. (Decided by the Supreme Court in the case of National Bank vs. Union Insurance Co., which decision is reported in Volume 88 of the California Reports, page 497.)

Section 222.—INSURANCE BY COMMISSION MERCHANT—INCORRECT STATEMENT AS TO OWNERSHIP.—The Springfield Fire and Marine Insurance Co. insured against loss by fire a stock of goods, the property of a corporation in which F. H. McCormick and F. N. Delanoy were stockholders; McCormick and Delanoy held the goods as security for advances made to the corporation, but in the application for the insurance they described the property as their own. The policy referred to the application, and made it a part of the policy, and provided that if the insured were not the sole, absolute, and unconditional owners of the property, and if their interest was not truly stated in the policy, then the policy should be void. McCormick and Delanoy sued the company for the insurance, but the Supreme Court decided that the policy was invalid, because the ownership was not truly stated in the application. (Decided by the Supreme Court in case of McCormick vs. The Springfield Fire and Marine Insurance Co., which decision is printed in Volume 66 of the California Reports, page 361.)

Section 223.—RIGHT OF ARBITRATION.—When a policy of fire insurance provides for arbitration upon the written request of either party, in case of difference touching any loss or damage after the proof, the arbitration is not a condition precedent to the right of action, unless demanded after proof of loss; and if no demand for arbitration is made within a reasonable time, or until after a right of action has become complete by the lapse of sixty days from the proofs of loss, the right to demand arbitration is waived. No right of arbitration exists under a fire insurance policy when the stipulation for arbitration does

not definitely fix the number of arbitrators nor provide a mode of selection. (Decided by the Supreme Court in case of Case vs. Manufacturers' Insurance Co., which decision is printed in Volume 82 of the California Reports, page 263.)

Section 224.—WAIVER OF PROOF OF LOSS BY ARBITRATION.—A provision in a policy of fire insurance, requiring the assured in case of loss to forthwith give notice thereof to the insurer, and produce a certificate of preliminary proof from a notary or magistrate, is waived, if the insurer, after learning of the loss, makes no objections to the absence of the notice and preliminary proof, but joins in proceedings for determining the loss by arbitration, which proceedings are required by the policy to be taken after proof of the loss has been received in due form. In such a case, the company cannot deny the authority of its agents to waive the provision of the policy as to notice and preliminary proof, when it adopts their acts in that regard, and relies on the award as a defense to an action to recover for the loss. (Decided by the Supreme Court in the case of Carroll vs. Girard Fire Insurance Co., which decision is printed in Volume 72 of the California Reports, page 297.)

Section 225.—WAIVER OF CONDITION AS TO PREPAYMENT OF PREMIUM.—An express provision in a policy of insurance that the company shall not be liable on the policy until the premium is actually paid is waived by the unconditional delivery of the policy to the assured, as a completed and executed contract, under an agreement that a credit shall be given for the premium, and the company is liable for a loss which may occur during the period of credit. If an insurance policy contains a formal receipt of premium, its unconditional delivery is conclusive evidence of payment, so far as to estop the company issuing it from denying the validity of the policy, notwithstanding a declaration in the policy that it shall not

be binding until the premium is actually paid. (Decided by the Supreme Court in the case of Farnum vs. Phoenix Insurance Co., which decision is printed in Volume 83 of the California Reports, page 246.)

Section 226.—REMEDY FOR UNAUTHORIZED TERM OF CREDIT.—The giving of any credit by authority of the insurance company being a waiver of actual payment as a condition precedent to liability, the only remedy for an unauthorized term of credit is for the company to personally notify the assured, who is obliged to pay the premium, that he must pay at the end of the authorized term of credit, or that the policy will be canceled for non-payment of premium. If the notice is sent by mail, and is not received, the cancellation for non-payment of premium is ineffective.

Section 227.—INSURANCE OF UNOCCUPIED BUILDING.—Insurance companies may by their acts and conduct be estopped from availing themselves of a defense which they might otherwise interpose to an action upon their policies, or may waive their right to avail themselves of such defense. If a building is insured against loss by fire under a policy containing a proviso that it shall be or become void in case the building is or shall become vacant or unoccupied, when it was well known to the company's agents at the date of the policy and subsequently that it was and remained unoccupied, the company will be presumed to have waived the clause as to occupancy. (Decided by the Supreme Court in case of West Coast Lumber Co. vs. State Investment and Insurance Co., which decision is printed in Volume 98 of the California Reports, page 502.)

Section 228.—LIABILITY OF INSURANCE COMPANY FOR FIRES CAUSED BY EARTHQUAKES.—The property of the insured was consumed in a general conflagration in San Francisco which had its origin in the earthquake of 1906. The fire was started at several points

in the city and spread to the insured property. The policy provided that the company should not be liable for loss caused directly or indirectly by invasion, or for loss or damage occasioned by or through any earthquakes. In Williamsburgh City Fire Ins. Co. v. Willard, volume 164, Federal Reporter, page 404, it was decided by the Circuit Court of Appeals that although the words "directly or indirectly" applied to invasions, they could not be made to embrace earthquakes; "occasioned" was equivalent to "caused"; and a loss indirectly caused by the progress of a fire from a distance, originally started by an earthquake, is a loss which the insurance company must pay. The Supreme Court of the United States affirmed the decision of the Circuit Court of Appeals.

Section 229.—CONDITION AS TO CHANGE OCCURRING IN BUILDING.—If a policy of insurance against fire contains a clause, that if the building shall fall except by fire, the insurance shall immediately cease, and the walls of the building are of brick, and a portion falls, leaving more than three-fourths standing, the building is not a fallen building within the condition of the policy, and if destroyed by fire in that condition the insurance company is liable for the loss. A clause in an insurance policy that it shall be void if any change occurs in the building by which the risk is increased without the consent of the company, has reference only to a change produced by the act of the insured. It does not mean a change occasioned by accident, or by any cause over which the insured had no control. (Decided by the Supreme Court in the case of Breuner vs. Liverpool and London and Globe Insurance Co., which decision is printed in Volume 51 of the California Reports, page 101.)

Section 230.—RULES FOR INTERPRETING CONTRACT OF INSURANCE.—A contract of insurance must be interpreted by the same rules as apply to any other contract. It must be so interpreted as to give effect to the

mutual intention of the parties as it existed at the time of contracting, so far as that intention can be ascertained. If the contract for insurance is in writing, as where an application has been signed and a policy issued, the intention of the parties is to be ascertained from the application and the policy alone, if possible. The whole contract is to be taken together. When it is partly written and partly printed, the written parts control the printed parts, and, if there is any conflict between the two, the printed part must be disregarded. The contract may be explained by reference to the circumstances under which it was made, and in cases of uncertainty it is to be interpreted most strongly against the party who caused the uncertainty to exist. Where the policy provides for the forfeiture of the contract, upon failure to perform conditions named, the policy is to be interpreted most strongly in favor of the insured. The law does not favor forfeitures, and the insurance company must make out a very strong case showing that a condition has not been complied with, before a court will declare the policy forfeited. The suit of Yoch vs. Home Mutual Insurance Company, decided by our Supreme Court in 1896, illustrates the rules which are to be applied to the interpretation of contracts of insurance, where the effort is to ascertain the intention of the parties at the time of contracting. The policy contained a printed condition that, unless otherwise provided by agreement indorsed thereon, it should be void if (any usage of trade to the contrary) gasoline was kept on the premises. Testimony was given at the trial of the case tending to show that gasoline is one of the articles of merchandise usually kept in country stores, but that it is customary to keep it in a room or building by itself. It was also shown that, during the month prior to the fire, the insured would, in the daytime, bring small quantities of gasoline—one or two cans—from a building on another lot, which was used for storing it, into a room within the insured building and adjacent to the store, for the purpose of selling it at retail to her

customers. The Supreme Court decided the case against the insurance company, and said: "It must be held that it was the intention of the defendant to insure gasoline, if it was an article usually kept in the country stores, and that, if such was its intention, it was no violation of the policy for the insured to keep gasoline upon the premises as a part of the stock of merchandise. When the defendant agreed to insure a stock of merchandise 'such as is usually kept in country stores,' it must be presumed to have known the character of the merchandise which is usually kept in country stores, and that gasoline is one of these articles, and, consequently, that the policy covered all such merchandise. When it was shown that gasoline is one of the articles which is usually kept in country stores, the court correctly held that it was a part of the subject of the insurance, and that the insured did not violate the policy by keeping it in stock. The defendant, when it issued the policy in question, knew the character of country stores, and that Mrs. Brooks kept for the purpose of retailing to her customers all of the articles kept by her, and that the gasoline which she kept was to be disposed of by retail in the same way as the other portion of her stock. To give to the policy the construction now claimed by the defendant would be to hold that, although it agreed with her to insure all the stock she usually kept in her store, yet, if she continued to keep that stock, she forfeited all rights under the policy. The clause in the policy above quoted, and which is relied on by the appellant, cannot be construed as having this effect. The qualification therein which excepts the policy from becoming void, viz., 'unless otherwise provided by agreement indorsed thereon,' is found in the policy itself. The subject-matter of the risk—the stock of merchandise 'such as is usually kept in country stores'—was written in the policy by the insurer; and, as the defendant must be deemed to have intended thereby to insure all such articles as are usually kept in a country store, it must be held that this was an 'agreement indorsed' upon the policy,

which removed the exemption from liability that would otherwise have existed. If there be any repugnance between the written phrase, 'such as is usually kept in country stores,' and the printed clause, 'any usage or custom of trade or manufacture to the contrary notwithstanding,' the former controls the latter, as being the more deliberate expression of the contracting parties." (Decided by the Supreme Court in the case of Yoch vs. Home Mutual Insurance Co., which decision is printed in Volume 107 of the California Reports, page 327.)

Section 231.—TIME WHEN POLICY TAKES EFFECT.—The general rule is that a policy, if delivered, takes effect from its date, unless it be otherwise stated in the policy, or unless there is evidence of a contrary intent. If the premium be paid, and the policy be not delivered till afterward, the policy yet takes effect as of its date, even though a loss intervenes. The circumstances and the intent of the parties are to control. Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs in all cases; where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it; if there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract. In the case last mentioned, if, before the contract of insurance is made, the property has ceased to exist, although unknown to the parties, the risk never attaches.

Section 232.—CONTRACT OF REINSURANCE—EFFECT OF PRIOR LOSS.—Where an insurance company, which has insured the property of a lumber company against loss by fire, contracts for reinsurance by way of partial indemnity with another insurance company, in the absence of any circumstances indicating the mutual intention of

the parties to give to the contract of reinsurance a retrospective effect, the company agreeing to insure is not liable if the property insured had been destroyed by fire prior to the agreement, though at the time of the application and agreement neither of the insurance companies knew of the prior destruction of the property. (Decided by the Supreme Court in the case of Union Insurance Company vs. American Fire Insurance Company, which decision is printed in Volume 107 of the California Reports, page 327.)

Section 233.—WARRANTIES.—Warranties, in insurance, are distinguished into two kinds: Affirmative, or those which allege the existence at the time of the insurance of a particular fact, and avoid the contract if the allegation be untrue; and promissory, or those which require that something shall be done or omitted after the insurance takes effect and during its continuance, the doing or omission of which will avoid the contract. An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture for non-compliance with the warranty. A warranty must be strictly complied with. Whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurance company, and not caused by the intervention of the law or the act of God, the insured can have no claim. One of the very objects of the warranty is to preclude all controversy about whether the statement was material or not. The only question in such cases is, Has the warranty been kept? If the warranty be a statement of facts, it must be literally true; if a

stipulation that a certain act shall or shall not be done, it must be literally performed. Illustrating the law, it may be said, that if a house be insured against fire, and the language of the policy is, "Warranted, during the policy, to be covered with thatch," the insurance company will be discharged from liability if during the insurance the house should be covered with wood or metal, although the risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties. Parties may contract as they please. When a warranty is adopted by them in their contract, the courts will not inquire as to its wisdom or folly, but must exact its observance as agreed to. The Supreme Court of California construed a "watchman clause" in a policy issued by the Scottish Union and National Insurance Co., which read: "Warranted by the insured that during such times as the within buildings or works are idle or not in operation, whether closed for repairs or during the absence of workmen, or otherwise (except as otherwise herein stated), one or more watchmen shall be on duty constantly, day and night, in and immediately about said buildings or works, or this policy shall be null and void." The insurance was on a sawmill, which was destroyed by fire. The watchman of the insured worked about the mill during the day, and slept at night in a house about 350 yards distant, and visited the buildings several times during the night. The Supreme Court held that this was not a sufficient compliance with the warranty in the policy that a watchman should be kept on duty "constantly day and night in and immediately about" the insured buildings. There was also a controversy in the case as to whether the mill was "shut down," within the meaning of the warranty in the policy, and the Supreme Court held that a sawmill which had stopped running for the winter is shut down, within the meaning of such term in a policy, though men are employed about the premises shipping lumber, and though the machinery has not been dismantled and

put in shape for the winter. (Decided by the Supreme Court of California in the case of McKenzie vs. Scottish Union and National Insurance Co., which decision is printed in Volume 112 of the California Reports, page 548.)

Section 234.—PROVISION AS TO BRINGING SUIT.—The policies of very many insurance companies have provisions similar to the following. "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after a full compliance by the insured with all the requirements of this policy, nor unless commenced within twelve months next after the fire." And, also, that "proof of loss shall be made to the company within sixty days after the fire." Where a policy contains these provisions, a suit on the policy cannot be maintained if the proofs of loss were made after sixty days, and there is no evidence of a waiver by the company of the condition.

Section 235.—PROOFS OF LOSS TO REINSURING COMPANY.—Where the risks of a fire insurance company are reinsured in another company, under a contract whereby the latter assumes the management and control of the business of the original insurer, and agrees to make adjustment and prompt payment of its losses, proofs of loss under a policy issued by the original insurer may be made to the reinsuring company. (Decided by the Supreme Court of California in the case of Whitney vs. American Insurance Co., which decision is printed in Volume 128 of the California Reports, page 121.)

Section 236.—LIABILITY OF HEIR FOR PREMIUM.—A policy procured by an heir, "on the estate" of deceased, protects the interest of the heir in the property, though the administrator of the estate repudiates the contract and has nothing in fact to do with it. Having procured the policy, the heir is liable for the premiums, and

will be compelled to pay them, no matter what action the administrator may take with regard to them. (Decided by the Supreme Court of California in the case of Phoenix Insurance Co. vs. Hancock, which decision is printed in Volume 123 of the California Reports, page 222.)

Section 237.—INSURANCE ON HARVESTER WHILE IN USE.—A policy of insurance on a harvester "while in use" does not cover a loss occurring while it is stored in a shed, and is not being actually used for harvesting purposes. (Decided by the Supreme Court of California in the case of Slinkard vs. Manchester Fire Assurance Co., which decision is printed in Volume 122 of the California Reports, page 595.)

Section 238.—LIABILITY OF COMPANY ON POLICY WRITTEN BUT NOT DELIVERED UNTIL AFTER FIRE.—A liability may attach to an insurance company, when the policy has been written but not delivered until after the fire. If the policy is the memorial of a contract, which in its essentials has been agreed upon verbally before the fire, and which the parties intended should take effect according to its terms, the fact that the policy was not delivered to the insured until after the fire will make no difference in the company's liability; and if the terms of the contract to insure, as verbally entered into, and afterwards embraced in the undelivered policy, are clearly shown, the company would be liable without any delivery of the policy at all. If, however, there has not been any verbal agreement, before the fire, that the company should insure the building and issue its policy accordingly, then delivery of the policy after the building has been destroyed, to the knowledge of the parties, will not give to the policy a binding effect. It is therefore in all such cases a very important question, whether the insurance company considered or admitted at any time that the contract was complete, and the risk had attached; and in this connection, the courts will always consider as

strong evidence in favor of the insured the declarations and admissions of the agents of the insurance company, while engaged in the transaction with the insured, and up to the time the policy is delivered. Such statements and admissions of the agents, to bind the company, must be made at the very time of the negotiations and transactions for the insurance, and while acting in the business with the insured. (Decided by the Supreme Court of California in the case of Crawford vs. Transatlantic Fire Insurance Co., which decision is printed in Volume 25 of the California Reports, page 609.)

Section 238a.—**STANDARD FORM OF FIRE INSURANCE POLICY.**—The Legislature of 1909 passed a law adopting a standard form of fire insurance policy for the State of California. The following form was adopted, and must be uniformly used by all insurance companies after August 1st, 1909:

CALIFORNIA STANDARD FORM FIRE INSURANCE POLICY.

No..... Amount, $.....

Rate .....

No other insurance permitted
except by agreement endorsed hereon or added hereto.

(Here insert name of company, and place of its main office in California, and name of State or country under which incorporated or organized.)

IN CONSIDERATION of the stipulations herein named and of.....dollars premium does insure..... for the term of.....from the.....day of..... 19...., at noon, to the.....day of.....19...., at noon, against all loss or damage by fire, except as hereinafter provided.

To an amount not exceeding.....dollars to the following described property while located and contained as described herein, and not elsewhere, to wit:

The company will not be liable beyond the actual cash value of the interest of the insured in the property at the

time of loss or damage nor exceeding what it would then cost the insured to repair or replace the same with material of like kind and quality; said cash value to be estimated without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or construction of buildings, and without compensation for loss resulting from interruption of business or manufacture.

This policy is made and accepted subject to the foregoing stipulations and conditions and those hereinafter stated, which are hereby specially referred to, and made part of this policy, together with such other provisons, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except by writing endorsed hereon or added hereto, and no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy shall not be valid until countersigned by the duly authorized agent of the company, at.....

In Witness Whereof, this company has executed and attested these presents (here insert name of company).

By.....

Countersigned at.....this.....day of.....19...

.....Agent.

Stipulations and Conditions Specially Referred to.

Property Not Covered. (a) This company shall not be liable for loss to accounts, bills, currency, evidences of debt or ownership or other documents, money, notes or securities; nor, (b) unless liability is specifically assumed hereon, for loss to bullion, casts, curiosities, drawings, dies, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, business or store or office furniture or fixtures, sculptures, frescoes, decorations, or property held on storage or for repair.

Hazards Not Covered. This company will not be liable for loss by (a) theft; or (b) by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire; or (c) (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; or (d) by invasion, insurrection, riot, civil war, or commotion,

or (except as hereinafter provided) by military or usurped power, or order of any civil authority, but the company will be liable (unless otherwise provided by endorsement hereon or added hereto) if the property is lost or damaged, by fire or otherwise, by civil authority or military or usurped power exercised to prevent the spread of fire not originating from a cause excepted hereunder and which fire otherwise probably would have caused the loss of or damage to the insured property.

Matters Avoiding Policy. This entire policy shall be void, (a) if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof; or (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Unless otherwise provided by agreement endorsed hereon or added hereto, this entire policy shall be void, (a) if the insured now has or shall procure any other insurance, whether valid or not, on property covered in whole or in part by this policy, or (b) if the interest of the insured be other than unconditional and sole ownership, or (c) if the subject of insurance be a building on ground not owned by the insured in fee simple, or (d) if with the knowledge of the insured foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or (e) if this policy be assigned before a loss.

Matters Suspending Insurance. Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring (a) while the hazard be materially increased by any means within the control of the insured; or (b) if the subject of insurance be a manufacturing establishment, while it is operated in whole or in part at night later than ten o'clock, or while it ceases to be operated beyond the period of ten consecutive days; or (c) while mechanics or artisans are employed in building or altering or repairing the described premises for more than fifteen days at any one time; or (d) while illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or (e) while there be kept, used or allowed on the described premises (any usage or custom of trade or manufacture to the contrary notwithstanding) calcium carbide, phosphorus,

dynamite, nitroglycerine, fireworks, or other explosives; or exceeding one quart each of benzine, gasoline, naphtha or ether; or more than twenty-five pounds of gunpowder; or (f) while a building herein described whether intended for occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days; (g) while the interest in title to or possession of the subject of insurance is changed excepting:—(1) by the death of the insured; (2) a change of occupancy of building without material increase of hazard; and (3) transfer by one or more several co-partners or co-owners to the others.

Such suspension shall not extend the term of this policy nor create any right for refund of the whole or any portion of premium, nor affect the respective rights of cancellation.

Chattel Mortgage. Unless otherwise provided by agreement in writing endorsed hereon or added hereto, this company shall not be liable for loss or damage to any property insured hereunder while encumbered by a chattel mortgage, but the liability of the company upon other property hereby insured shall not be affected by such chattel mortgage.

Fallen Building Clause. Unless otherwise provided by agreement endorsed hereon or added hereto, if a building or any material part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Removal when Endangered by Fire. Should any of said property be necessarily removed because of danger from fire, and there is no other insurance thereon, that part of this policy in excess of the value of the insured property remaining in the original location, or, if there is other insurance thereon, that part of this policy in excess of its proportion of the value of the insured property remaining in the original location, shall, for the ensuing five days only, cover said removed property in its new location or locations.

Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case the company shall, upon surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time, without tender of unearned portion of premium, by the company by giving five (5) days' written notice of cancellation to the insured and to any mortgagee or other party to whom, with the written consent of the company, this

policy is made payable, in which case the company shall, upon surrender of the policy or relinquishment of liability thereunder, refund the excess of paid premium above the pro rata premium for the expired time.

Duty of Insured in Case of Loss. When a loss occurs the insured must give to this company written notice thereof without unnecessary delay; and shall protect the property from further damage; forthwith separate the damaged and undamaged personal property and put it in the best possible order; and without unnecessary delay make a complete inventory stating as far as possible the quantity and cost of each article, and the amount claimed thereon.

Within sixty days after the commencement of the fire the insured shall render to the company at its main office in California named herein preliminary proof of loss consisting of a written statement signed and sworn to by him setting forth:—(a) his knowledge and belief as to the origin of the fire; (b) the interest of the insured and of all others in the property; (c) the cash value of the different articles or properties and the amount of loss thereon; (d) all incumbrances thereon; (e) all other insurance, whether valid or not, covering any of said articles or properties; (f) a copy of the descriptions and schedules in all other policies unless similar to this policy, and in that event, a statement as to the amounts for which the different articles or properties are insured in each of the other policies; (g) any changes of title, use, occupation, location, or possession of said property since the issuance of this policy; (h) by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire.

If the company claims that the preliminary proof of loss is defective and within five days after the receipt thereof (without admitting the amount of loss or any part thereof) notifies in writing the insured, or the party making such proof of loss, of the alleged defects (specifically stating them) and requests that they be remedied by verified amendments the insured or such party within ten days after the receipt of such notification and request must comply therewith, or, if unable so to do, present to the company an affidavit to that effect.

The insured shall also furnish, if required, as far as it is practicable to obtain the same, verified plans and specifications of any buildings, fixtures, or machinery destroyed

or damaged; and the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described and shall submit to examination under oath, as often as required, by any such person, and subscribe to the testimony so given and shall produce to such person for examination all books of account, bills, invoices, and other vouchers, and permit extracts and copies thereof to be made, and in case the originals are lost certified copies, if obtainable, shall be produced.

Ascertainment of Amount of Loss. This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this comapny shall forthwith demand in writing an appraisemnt of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

The parties to the appraisement shall pay the appraisers respectively appointed by them and shall bear equally the expenses of the appraisement and the charges of the umpire.

If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and

completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.

Options of Company in Case of Loss. This company may, at its option, take all or any part of the property for which insurance hereunder is claimed at its ascertained or appraised value, and may also, at its option, in satisfaction of its liability hereunder, repair, rebuild or replace any building or structure or machine or machinery used therein, with other of like kind and quality, within a reasonable time, upon giving notice within twenty days of its intention so to do after the receipt by it of the preliminary proof of loss, or, if verified amendments have been requested, within twenty days after their receipt, or, within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments.

There can be no abandonment to this company of any property.

Apportionment of Loss. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, and expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property whether valid or not, or by solvent or insolvent insurers.

Loss when Payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt.

Non-waiver by Appraisal or Examination. This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof, by assenting to the amount of the loss or damage or by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

Subrogation. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and

such right shall be assigned to this company by the insured on receiving such payment.

Time for Commencement of Action. No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire.

Definitions. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured in case of his death, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage," and wherever the words "the time of loss or damage" are used they shall be deemed the equivalent of "the time of the commencement of the fire."

Sec. 2. There shall be printed on the outside fold of said policy in type not smaller than small pica the following words in this form:

READ THIS POLICY.

Ins. Co. is liable only for actual cash value.

Policy is void in case of any fraud, false swearing, misrepresentation or concealment about material facts.

Policy is void, unless otherwise agreed in writing, if

1st. It is assigned before loss;

2nd. Insured has or shall procure other insurance;

3rd. Any change occurs in location of property;

4th. Insured building is on ground not owned in fee simple by insured;

5th. Insured is not sole and unconditional owner.

Policy is suspended, unless otherwise agreed in writing, if

6th. Described building becomes vacant or unoccupied for 10 days;

7th. Mechanics are employed more than 15 days in repairing same;

8th. Property is or becomes encumbered by chattel mortgage;

9th. Illuminating gas or vapor is generated in or adjacent to described building;

10th. Explosives or prohibited quantities of gasoline, etc., are kept on premises.

Insurance ceases if described building or any material part falls except as result of fire.

Policy does not cover certain enumerated personal property.

Note particularly duty of insured in case of loss;

Also provisions avoiding or suspending policy, including changes of ownership or possession.

Fire Insurance Agents

Section 239.—APPOINTMENT AND AUTHORITY OF AGENTS.—It is not necessary that the agent of a fire insurance company should have or produce a written appointment, for his agency may be shown in many other ways. The fact of his agency may be inferred from the relations he sustains to the company, from the course of prior dealings and transactions connected with it, and from the acts of the company with reference to the particular policy in question. The agent's authority may be actual or ostensible. He may possess and show an appointment in writing, or the company may accept the fruits of his labors, and knowingly permit him to hold himself out publicly as the company's agent. In either case the company will not be allowed to shield itself behind the defense that he was not really an agent. The powers of the agent are prima facie coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom it transacts business for the acts and declarations of the agent within the scope of his employment.

Section 240.—BROKERS OR AGENTS.—The question arises as to the difference between a broker and an agent, in suits where a company makes the defense that the person claimed to have acted as its agent was not such in fact, but did act for the owner of the property. Where it is shown that the owner of the property solicits an insurance agent to procure insurance for him, and himself pays the commission, such agent will be deemed not the agent of the company, but of the insured. He will be deemed a mere broker, making a bargain for the insured, and receiving a commission from him for so doing. But where the company employs a person to solicit insurance, and provides him with blanks and other papers, and pays

him a commission on the business he brings in, he will be deemed the agent of the company, and not of the insured. In following sections will be found illustrations of some leading principles of agency in fire insurance, as decided by the Supreme Court of California.

Section 241.—AGENT WAIVING FORFEITURE.—Simon Silverberg sued the Phenix Insurance Company upon a policy of fire insurance. When the case was tried, it appeared that soon after the occurrence of the fire, the company being notified of the fact, directed the proofs to be made out, which was done, and subsequently required Silverberg to present witnesses and vouchers. After these witnesses and vouchers had been examined at length, the company said the proofs were satisfactory, instructed Silverberg to make out formal proofs of loss, and said that the money would be paid at the expiration of the sixty days allowed by the policy for the payment of the loss. Upon the expiration of sixty days, a demand being made for the money, the company declared that the policy had been avoided by a breach of its conditions, and refused to pay. The question was whether the company's agents had waived the condition of the policy of which it was claimed there had been a breach. The facts were, that the agents of the company had full knowledge of all the facts upon which the forfeiture was based, and with this knowledge informed Silverberg that the insurance would be paid, and then refused to pay and claimed forfeiture. The Supreme Court held that the acts of the company's agents in examining witnesses and vouchers, and then expressing satisfaction and a willingness to pay, after full knowledge of all the facts, constituted a waiver of any forfeiture by Silverberg resulting from a breach of the conditions of the policy. The agents of the company were authorized, there being no provision in the policy to the contrary, to modify or altogether waive a condition of the policy. (Decided in the case of Silverberg vs. Phenix

Insurance Company, which decision is printed in Volume 67 of the California Reports, page 36.)

Section 242.—AUTHORITY OF LOCAL AGENT.—A local agent of a fire insurance company, who has authority to make a consummated and binding contract of insurance by countersigning and delivering its policy, and to extend a limited credit for the premium, has the power of the company to waive a condition in the policy that it shall not be binding until the premium is actually paid, and does waive such condition by delivering the policy unconditionally under an agreement for credit, though the term of credit given be in excess of his actual authority.

Section 243.—OSTENSIBLE GENERAL POWER OF LOCAL AGENT.—A local agent of a fire insurance company who is clothed with ostensible general authority to solicit applications, receive proposals, make contracts for insurance, receive first premiums, and to countersign and deliver policies within certain limits, is presumed to have the general power of the company within those limits to waive conditions precedent to the liability of the company upon policies which he is authorized to countersign and deliver. Such local agent is presumed to have power coextensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals; and he may bind his principal by any acts or contracts within the general scope of his apparent authority.

Section 244.—KNOWLEDGE OF AGENT IS THE KNOWLEDGE OF COMPANY.—Whether an agent has general or only particular powers is not determined by simply calling him an agent. Where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to an agent of the company, local or general, who is authorized

to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company; and if the agent, with a knowledge of the breach of the condition, still recognizes the validity of the policy, this constitutes a waiver by the company of the forfeiture, and also a waiver of the general requirement that conditions can only be waived in writing indorsed on the policy itself. (Decided by the Supreme Court of California in the case of Farnum vs. Phoenix Insurance Company, which decision is printed in Volume 83 of the California Reports, page 260.)

Section 245.—**ORAL WAIVER OF INDORSEMENT BY LOCAL AGENT.**—A local agent who is clothed with general power to consummate contracts of insurance within a certain territory stands in the stead of the insurance company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to its liability by oral agreement, so far as to estop the company from questioning its original liability by reason of non-indorsement of the waiver upon the policy when delivered.

Section 246.—**APPLICATION MADE OUT BY AGENT OF COMPANY.**—Insurance companies who do business through the medium of agents are responsible for their acts within the general scope of the business intrusted to their care, and no limitations of their authority will be binding on parties with whom they deal, which are not brought to their notice. When the agent undertakes to prepare the application for the insured, he will be regarded in doing so as the agent of the insurance company, and not of the insured; and any misstatements contained in the application, of which the insured is ignorant, will not be fatal to the policy. (Decided by the Supreme Court of California in the case of Wheaton vs. North British

and Mercantile Insurance Company, which decision is printed in Volume 76 of the California Reports, page 415.)

Section 247.—FRAUD OF AGENT—DISOBEDIENCE OF INSTRUCTIONS.—A fire insurance company is bound by the acts, omissions, or frauds of its agent when acting within the scope of his employment, though he may have disobeyed the instructions received; and the company cannot be permitted to derive any advantages from the fraud of the agent in the manner of transacting its business, upon the claim that the agent's fraudulent conduct was not authorized. Therefore, fraudulent concealment of facts, or fraudulent representations of an agent to the insured, binds the company he represents, when the insured has no notice of any limitations upon the authority of the agent in the transaction. (Decided by the Supreme Court of California in the case of Stockton Harvester Works vs. Glenn's Falls Insurance Co., which decision is printed in Volume 98 of the California Reports, page 557.)

Section 248.—WAIVER OF PETROLEUM CLAUSE BY AGENT.—A condition in a policy for loss occurring while petroleum is kept or used on the insured premises is waived, if the general agent of the insurer, having knowledge at the time the insurance was effected that petroleum was kept and used, consented thereto, and represented to the insured that such use would not vitiate the policy. (Decided by the Supreme Court of California in the case of Herman Kruger vs. Western Fire and Marine Insurance Company, which decision is printed in Volume 72 of the California Reports, page 91.)

Section 249.—WAIVER CONTINUES DURING RENEWAL OF POLICY.—A waiver of conditions in the policy, made by the agent of the company at the time the insurance was originally effected, continues during the subsequent renewals of the policy.

Section 250.—AUTHORITY OF SPECIAL AGENT.—Power given to a special agent of a fire insurance company to receive proposals for insurance, and to receive premiums, subject to the rules of the company and instructions given by its general agent, includes power to make a verbal contract for insurance, sanctioned by instructions from the general agent.

Section 251.—ORAL PROMISE OF POLICY.—A declaration by the special agent to the insured, made at the time of his application for insurance, that it was unnecessary for him to make a written application, as the general agent was asking for the insurance, and a promise by the special agent that a policy should be given to the insured which would cover the insurance applied for to the date of the oral application, taken in connection with letters from the general agent asking if the insurance would be required, is sufficient proof of the special agent's authority to bind the company for insurance from the date of the oral application. (Decided by the Supreme Court of California in the case of Harron vs. City of London Fire Insurance Co., which decision is printed in Volume 88 of the California Reports, page 16.)

Section 252.—AGENT'S KNOWLEDGE OF FORMER INSURANCE.—Many policies contain the provision, that "if any other insurance has been or shall hereafter be made upon the said property and not consented to by this company in writing hereon, this policy shall be null and void." But notwithstanding this provision, where there is former insurance, which is not noted on the policy in question, if the agent of the company knows of the former insurance, and the policy is issued, such knowledge of the agent is knowledge of the company, and the policy is valid.

Section 253.—OFFER TO RENEW POLICY.—Where the local agent of a fire insurance company has no actual

or ostensible authority to contract for the renewal of a policy, a proposal made to such agent for a renewal is, until communicated to and accepted by the insurance company, nothing more than a mere offer to renew the policy; and the fact that the agent promised to communicate the offer to the company, and did not do so until after the loss, does not create a binding contract of renewal. (Decided by the Supreme Court of California in the case of Stewart vs. The Helvetia Swiss Fire Insurance Co., which decision is printed in Volume 102 of the California Reports, page 218.)

Section 254.—UNAUTHORIZED CONTRACT OF LOCAL AGENT.—The local agent of the New Zealand Insurance Co. at Fresno was not authorized to make contracts, but sent all applications to the Company at San Francisco for acceptance; he received an application, however, and told the insured that the insurance would begin at that time; before the application was mailed from Fresno the building was burned; the company was sued for the loss, but the Supreme Court said, that as the local agent had no actual or ostensible authority to make a contract of insurance, and the building being a saloon, which class of risks the company did not take, the company was not liable for the loss; and it made no difference that at the time when the application was made the special agent of the company, who had no authority to enter into contracts, was present and approved of it. (Decided by the Supreme Court of California in the case of O'Brien vs. New Zealand Insurance Company, which decision is printed in Volume 108 of the California Reports, page 227.)

Section 255.—WAIVER FROM KNOWLEDGE OF AGENT.—The act of the agent of a fire insurance company, in issuing a policy on an application alleging unconditional ownership, is a waiver of such condition, where the agent knows at the time that the property is mortgaged,

and that a foreclosure suit is pending. (Decided by the Supreme Court of California in the case of Breedlove vs. Norwich Union Fire Insurance Co., which decision is printed in Volume 24 of the California Reports, page 164.) A is the true owner of property which stands in the name of B. A informs the insurance company of the condition of the title, and has the property insured in the name of B, and the loss made payable to A "as his interest may appear." It was stipulated in the policy that it should be void if the interest of the insured should be other than unconditional and sole ownership. Held by the District Court of Appeals, that the issuance of the policy upon the known facts was a waiver of all conditions inconsistent therewith, and the true owner was entitled to recover the amount of the policy, although the title to the property stood in the name of another. The company was informed of this before the policy was issued, and was bound by that knowledge. (Decided by the California District Court of Appeals in the case of Loring vs. Duchess Insurance Company, which decision is printed in Volume I, California Appellate Decisions, page 128.)

Life Insurance

Section 255a.—INSURABLE INTEREST.—The contract of life insurance must be based upon an insurable interest, and this insurable interest must arise from the relation of the party taking the insurance to the insured, either as surety or debtor, or from the ties of blood or marriage, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the insured life. Every person has an insurable interest in the life of himself; and in the life of any person on whom he depends wholly or in part for education or support; and in the life of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death might delay or prevent the performance; and in the life of any person upon whose

life any estate or interest vested in him depends. A person who is not related to another has no insurable interest in his life, unless the latter is his debtor, or in some other pecuniary way so connected with him as to afford reasonable ground for expecting some relief or advantage from the continuance of the life of the insured. The result of this rule is, a person cannot take insurance upon the life of a mere stranger, not related, or under obligation in some pecuniary way; for such a policy would be nothing more nor less than a wager or gambling policy, which the law does not allow. Husband and wife have an insurable interest in the lives of each other, and so do father and child. It has been held by the courts that a stepson has no insurable interest in the life of his stepfather, where he has a separate home and family of his own, and is not a creditor, nor in any way dependent upon or responsible for the support of the stepfather. An interest, to be insurable, must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. Public policy does not allow any one having no insurable interest to be the owner of a policy of insurance upon the life of a human being. The public has an interest, independent of the consent and concurrence of the parties, that no inducement shall be offered to one man to take the life of another.

A person has such an insurable interest in his own life that he may insure it for the benefit of his heirs, or even for the benefit of a stranger.

Civil Code, Section 2763.

Section 255b.—CREDITOR'S INTEREST.—A creditor may lawfully take out a policy on the life of his debtor in an amount sufficient to cover the debt, with interest.

Section 255c.—DELIVERY OF POLICY.—Actual delivery of the policy into the hands of the insured is not necessary in order to bind the company. If the first premium is paid to and accepted by the company, and a policy

issued with intent to deliver to the insured, it is valid and binding even though the insured dies before the policy reaches him. An unconditional delivery of a policy by the company to its agent, for delivery to the insured, binds the company, although the agent never parts with possession of the policy. Possession of the policy by the insured, at his death, is prima facie proof that it was duly delivered to him.

Section 255d.—PLACE OF CONTRACT.—It is sometimes important to determine where the law puts the location of a contract, the place where it is deemed to have been made. The rule on this subject is, that the contract is deemed to have been made where the policy is issued. For instance, if the application is sent to the office of the company in New York, and the policy is executed and issued there, it is a New York contract, to be construed according to the laws of New York. If, on the other hand, the policy is executed and issued from the office of the company in the State of California, it is a California contract, to be construed according to the laws of California. It is to be understood, in this connection, however, that it is within the power of the contracting parties, by the express terms of their contract, to establish the place where it shall have effect, and under what laws it shall be construed. If anything appears in the application upon which the policy is issued, or in the policy itself, that discloses an intention that the policy shall be construed according to the laws in force in any other state than the one in which it was actually made and delivered, such intention must govern, and will have the effect, so far as the construction of the contract is concerned, to change the place of its execution so as to correspond with the intention of the parties.

Section 255e.—INTERPRETATION OF POLICY.—A policy of life insurance must be interpreted and construed according to the principles which govern other contracts.

The intention of the parties is the first thing to be considered, and that intention is to be ascertained from the policy itself, if possible. The courts do not favor forfeitures, and a policy of insurance will always be construed in favor of upholding the contract, if such construction is possible from the language used. All conditions involving forfeitures will be construed strictly as against the company, and most favorably for the insured. When a policy is capable of two meanings, that which is most favorable to the insured will be adopted by the courts.

Section 255f.—CONDITIONS IN POLICY.—The conditions in a life insurance policy, to be observed by the insured—as, for payment of premiums, or against use of alcoholic beverages, and other stipulations—must be adhered to by the insured, at the risk of rendering the policy void if he does not observe them. But the courts construe the conditions named in a policy most strongly against the company, and in favor of the insured. There are conditions stated, too, the violation of which does not render the policy absolutely void, but only make it voidable, at the option of the insurance company. Of these, the conditions prohibiting the insured from traveling, or living in certain places, may be cited as illustrations of the kind of conditions the breach of which renders the policy voidable, and not void. The company, upon the breach of such conditions, may proceed to declare a forfeiture, and cancel the policy; or it may, by accepting further premiums, or recognizing the continued life of the policy, evidence a waiver on its part of the voidable conditions.

Section 255g.—WAIVER OF CONDITIONS.—A waiver of the conditions in a policy may be either verbal or in writing. If in writing, the writing speaks for itself. But a waiver may be shown by acts and circumstances. Where the agent of a life insurance company, having knowledge of some act on the part of the insured constituting a breach

of condition, proceeds to treat the policy as valid, by accepting premiums, or in some other way ignoring the breach, the breach of condition will be considered as having been waived by the company. If an insurance company, having knowledge of facts rendering its policy voidable, deliberately claims and exercises a right under the policy, it waives all right to avoid it because of such facts. An insurance company is not permitted to collect premiums with full knowledge of facts which might avoid the policy, (and knowing that the insured continues to disregard a provision working a forfeiture,) and then to deny the validity of the policy when a loss occurs. The company will always be bound by its waiver of the conditions in a policy. If an insurance company, after knowledge of any default for which it might terminate the policy, enters into negotiations or transactions with the insured which recognize the continued validity of the policy and treat it as still in force, the right to claim a forfeiture for such previous default is waived.

Section 255h.—REPRESENTATIONS BY INSURED.—A person who makes an application for life insurance must not make false representations about any material matter, for if he does do so the policy can be canceled. False answers about the health of the applicant will render a policy voidable. Concealing the truth, as when the applicant states that he is in good health, when in fact he is suffering from disease, will be good reason for canceling a policy.

The law presumes that all the answers to questions contained in an application are true and correct, and it is for the company to show that the statements which it claims as false really are so, if it seeks to avoid a policy on the ground of false representations by the insured.

Section 255i.—EFFECT OF DISEASE OF APPLICANT ON POLICY.—A disease known to the applicant

for a policy, but not discovered by the agents of a company. and concealed by the applicant, will be ground for forfeiture. But, if the applicant is afflicted with a disease and does not know it, his failure to communicate the fact will not be regarded as a fraud upon the insurance company.

Section 255j.—MEANING OF "GOOD HEALTH."—The health of body required at the time of making application for life insurance is not perfect and absolute health, nor is it necessary that it should exclude all disorders and infirmities which may possibly shorten life. Only an ordinary and reasonable degree of health is required, in order to make the insurance effective. The term "good health," when used in an application for a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the soundness and healthfulness of the system. A mere temporary indisposition, which does not tend to weaken or undermine the constitution of the person at the time of insuring, does not render a policy void.

Section 255k.—MALT AND SPIRITUOUS BEVERAGES.—The question, "Do you use malt or spirituous beverages?" asked of an applicant for life insurance refers to a customary and habitual use, and not to a single or occasional act or use; and the question, "Have you always been temperate?" means moderation, and an abstinence from excessive or injurious use, and not total abstinence from the use of malt or spirituous liquors.

Section 255 l.—PAYMENT OF PREMIUMS.—Notice must be given to the insured of the time when premiums become due, and the premiums must be paid promptly, in order to save the policy from forfeiture, unless the company waives payment when due and extends the time.

Section 255n..—CREDIT FOR PREMIUMS.—A provision in a policy of insurance, that the company shall not be liable until the premium is actually paid, is waived by an unconditional delivery of the policy to the insured as a completed contract under an express or implied agreement that credit shall be given.

Section 255n.—FORFEITURE FOR NON-PAYMENT OF PREMIUM.—If the premium is not paid, after notice from the company, the policy will be forfeited. But when an insurance company receives payments of premiums when they are overdue, and when it might refuse payment and declare the policy forfeited under its "by-laws," it cannot accept and keep the money, and still insist upon a forfeiture.

Forfeiture of a life insurance policy for non-payment of premium when it becomes due cannot be insisted upon by the company, when by the terms of the policy the insured is entitled to share in the profits, and therefore cannot know without notice what amount he is required to pay, and no notice has been given to him of what sum the company claims to be due on the policy.

Section 255 o.—REVIVAL OF FORFEITED POLICY.—A policy of life insurance, forfeited for non-payment of premium at maturity, can only be revived, as far as the insured is concerned, by the actual payment and acceptance of the overdue premium, or by a contract with the company based upon a sufficient consideration to revive and reinstate the insurance.

A reinstatement of the insurance after a forfeiture is not the making of a new contract, where no different terms are agreed upon. It simply restores the old policy.

Section 255p.—PROOF OF DEATH.—The requirements of the policy as to proof of death must be complied with by the beneficiary before he can collect the insurance.

If the policy states the proof which must be furnished, and the time, its directions must be obeyed. If the policy does not state the particular proof, or the manner of making proof, the fact of death must be shown to the company with reasonable definiteness and certainty, in any reasonable manner.

Failure to furnish proof of death within the time limited by a life insurance policy is waived, when the company makes a proposal to settle, or absolutely refuses to pay, or denies all liability, or asks for additional proof without making objection that the proof given was not furnished in time.

Section 255q.—SUICIDE.—In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability, or for the forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy. Where a policy of life insurance contains a condition that in case the insured shall die by his own hand, whether sane or insane, the policy shall become null and void, the suicide of the insured will prevent a recovery on the policy. But the presumption is against the suicide of the insured, and the company, if it refuses to pay on that ground, must itself furnish satisfactory proof that the insured did die by his own hand. Nothing appearing to the contrary, the legal presumption is that a man died from a natural cause, and not from an act of self-destruction. The mere fact of death in an unknown manner creates no presumption of suicide.

Section 255r.—ASSIGNMENT OF POLICY.—A policy of life insurance may be assigned and transferred, and the assignee will stand in the place of the insured, be subject to his liabilities, and entitled to his benefits. The assignment may be an absolute sale and transfer, or the policy may be assigned as security for a debt. Notice of the assignment is not required to be given to the company,

unless the policy contains a condition requiring such notice to be given.

A policy on the life of the insured payable to his legal representatives may be assigned by him, with the consent of the company; and in such case the rights of the assignee are paramount to the claims of the heirs or personal representatives of the insured.

The assignment may be to relatives of the insured, or it may be to a stranger who has no insurable interest in the life of the insured.

If a policy of insurance expressly stipulates that no assignment shall be valid without the consent of the company, an assignment without such consent is without effect. The insured, in this case, is presumed to have taken out the insurance with knowledge of the stipulation, and is bound by it.

Assignment of a policy, made payable to certain described beneficiaries, should be with the consent of the beneficiaries.

Civil Code, Sections 2764, 2765.

Section 255s.—BENEFICIARIES OF LIFE INSURANCE.—The insured may have the policy made payable to his estate, or to particular persons named in the policy as beneficiaries.

A policy of life insurance creates vested interests in the beneficiaries named therein, and although the contract may be canceled by the company in case the insured fails to keep the stipulations, the insured himself cannot revoke the contract without the consent of the beneficiaries.

The proceeds of a policy of life insurance made payable to the heirs of an insured husband go to his widow and children, in the proportion provided by the laws of the State for distribution of estates.

Section 255t.—DEDUCTION OF UNPAID PREMIUMS.—The insurance company is entitled to have the amount of premium remaining due for the current year,

after the death of the insured, deducted from the amount of the policy before paying it.

Life Insurance Agents

Section 255u.—PRINCIPLES OF AGENCY.—The principles of agency stated under the head of "Fire Insurance Agents" apply equally to agents of life insurance companies. They bind their principals in the same way; their representations as to the business entrusted to them have the same effect; they may waive conditions of the contract to the same extent; and, as there is no special rule applying particularly to life insurance agents, it will be sufficient, as to them, to refer to the subject of "Fire Insurance Agents."

Accident Insurance

Section 255v.—THE POLICY.—A policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to the subject to which it is applied. In the construction of an accident insurance policy, however, its provisions will be usually interpreted most favorably for the insured, in case of doubt or uncertainty in their terms. If a stipulation or exception in a policy of accident insurance is capable of two meanings, that will be adopted which is most favorable to the insured. In other words, if there is doubt or uncertainty as to the meaning of terms employed in a policy of accident insurance, the language must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in effecting the insurance, it was his object to secure.

Section 255w.—DEFINITION OF ACCIDENT.—Some difficulty has been experienced by the courts in arriving at a satisfactory and comprehensive definition of the word

"accident" as used in insurance policies. Worcester defines "accident" to be "an event proceeding from an unknown cause, or happening without the design of the agent." Webster's definition is, "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected."

The definition of "accident" generally adopted is, an event happening without any human agency, or, if happening through human agency, an event which, under the circumstances, is unusual, and not expected by the person to whom it happens.

Disease, produced by the action of a known cause, cannot be considered accidental. In the term "accident" is necessarily involved some violence, some unusual and unforeseen cause.

Section 255x.—DEATH BY ACCIDENTAL MEANS.—"Death by accident" means death from any unexpected event which proceeds from an unknown and unforeseen cause, happening without the design of the person to whom the accident occurs. Unnatural death, the result of accident of any kind, imports an external and violent agency as the cause.

Section 255y.—HANGING ONE'S SELF WHILE INSANE.—It has been held that it is accidental death, where one hangs one's self while insane, unconscious of the act, and incapable of an intelligent intention to take one's own life.

Section 255z.—BEING KILLED BY ROBBERS.—Death by being waylaid and assassinated by robbers makes the company liable, under a policy insuring the person so killed against death through "external, violent, or accidental means."

Section 255aa.—DEATH BY DROWNING.—Drowning is a death from external violence, in the meaning of an accident insurance policy.

Section 255bb.—DEATH FROM FRIGHT.—Where the insured was driving upon a public street, and his horse became frightened by an unsightly object, without upsetting the carriage or coming in contact with anything, and was at length brought under control, but the insured was apparently greatly endangered at the time, and suffered so severely, either from fright or strain caused by physical exertion in restraining the horse, that he died within an hour afterward; it was held that his death was caused by "bodily injuries effected through external, violent, and accidental means."

Section 255cc.—DEATH BY FALLING.—Where the insured while traveling by rail, during a stoppage of a train on a bridge, went to the front platform of the coach in which he was riding and stepped off, falling through a hole in the floor of the bridge and meeting his death, this was held to be death by accident in the meaning of the policy.

If a temporary and unexpected physical disorder causes the insured to fall and injure himself, the injury is received through violent, external, and accidental means, and the insurance company is liable therefor.

Section 255dd.—TAKING POISON BY MISTAKE.—The words "taking poison," as employed in a clause of an accident insurance policy, exempting the company from liability for death from "taking poison," mean the voluntary, intentional taking of poison, and do not include cases of accidental poison. Hence, the company is liable for the death of one who, by mistake, drinks carbolic acid for peppermint, which he wishes to take for some ailment, and dies from the effects of the poison.

Section 255ee.—DEATH BY MURDER.—Whether the company will be liable for death by murder, in any case, depends upon the wording of the policy. If the policy exempts the company from liability for "intentional injury inflicted by the insured or any other person," then the company will not be liable for the murder of the insured. If, however, the policy covers merely "injuries from external violence and accidental means," without the exception above noted, the company will be liable when the insured is murdered.

Section 255ff.—DEATH BY INHALING GAS.—The inhaling of gas, within the exemption of insurance policies, means a voluntary and intelligent act of the insured, and not an involuntary and unconscious act. Therefore, if the insured while he sleeps is accidentally overcome by inhaling gas without intention or connivance on his part, the company will be liable.

Section 255gg.—LOSS OF HAND.—Under a policy making the company liable for "loss of hand" it is not necessary to show that the entire hand is gone. If the hand is so injured as to become useless as a hand, the company is liable as for an entire loss.

Section 255hh.—LOSS OF FEET.—Under a policy agreeing to pay an indemnity for loss of "two entire feet," it is not necessary to show, in order to make the company liable that the legs or feet were severed from the body. It is only necessary to show that the insured has lost the use of the feet as members of his body; as, where through accident the lower part of the body has become totally paralyzed, and thus the use of the feet destroyed.

Section 255ii.—LOSS OF BUSINESS.—If a policy provides that the insured shall be paid a certain sum per week, for the immediate, continuous, total loss of such business

time as may result from an accidental injury, he is entitled to recover if his injury is such that he loses his time in the business in which he was engaged when insured, though there are other business pursuits from which the accident would not incapacitate him.

Section 255jj. — TOTAL DISABILITY. — The insured suffers a total disability, if his injuries are of such character that common care and prudence require him to desist from the transaction of any business pertaining to his occupation, so long as it is reasonably necessary to effect a cure. Ability to occasionally perform some single and trivial act of business does not render his disability partial instead of total, provided he is unable substantially, to a material extent, to transact any kind of business pertaining to his occupation.

Section 255kk.—"DISEASE" AND "BODILY INFIRMITY."—The words "disease" and "bodily infirmity," as used in an accident insurance policy, exempting the company from liability for injury from such cause, mean, practically, the same thing. They refer to some ailment or disorder of a somewhat established and settled character, some physical disturbance to which the insured is subject, and of which an attack causing him an injury is, in some measure, a recurrence; and they have no reference to some temporary disorder, new and unusual, arising from some sudden and unexpected derangement of the system.

Section 255 ll.—DISEASE PRODUCED BY KNOWN CAUSE.—Disease produced by the action of a known cause cannot be considered as accidental. Thus, disease, or death, engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot properly be said to be accidental.

Section 255mm. — CONDITION AGAINST CHANGE OF OCCUPATION.—Where there is a condition in a policy against change of occupation by the insured, the

word "occupation" has reference to the vocation, trade, or calling which he is engaged in for hire or for profit; and the condition does not preclude him from the performance of acts and duties which are incidentally connected with the life of men in any or all occupations, or from engaging in mere acts of exercise, diversion, and recreation.

Section 255nn.—VOLUNTARY EXPOSURE TO DANGER.—The insured cannot recover upon an accident insurance policy if he has voluntarily and intentionally exposed himself to the danger from which the injury resulted. Voluntary exposure to unnecessary danger, within the meaning of an accident insurance policy, is a conscious or intentional exposure involving gross or wanton negligence on the part of the insured. The intention of the insured to voluntarily expose himself to unnecessary danger may be inferred from his acting so recklessly and carelessly as to show an utter disregard of known danger, or from his taking the risk of a danger which is so obvious that a prudent man, exercising reasonable forethought, would not have taken it.

Section 255 oo.—PROOF OF INJURY OR DEATH.—Proof of injury or death must be given in the manner and at the time specified in the policy. The company may waive the proof, either expressly, or by conduct and acts which amount to a waiver; but, if there is no waiver on the part of the company, proof of injury or death must be made as required by the policy.

Accident Insurance Agents

Section 255pp. — PRINCIPLES OF AGENCY. — The principles of agency stated under the head of "Fire Insurance Agents" apply equally to agents of accident insurance companies. They bind their principals in the same way; their representations as to the business entrusted to them have the same effect; they may waive conditions of the

contract to the same extent; and as there is no special rule applying particularly to accident insurance agents, it will be sufficient, as to them, to refer to the subject of "Fire Insurance Agents."

Marine Insurance

Section 255qq. — THE POLICY. — Marine insurance, though upon property and against risks unknown on land, is to be construed by the same principles which apply to other insurance policies. In the construction of a marine policy, as in the construction of other policies, the intention of the contracting parties is the first thing to be determined. The courts will enforce the contract as the parties intended it to be, provided this can be done without violation of law and in accordance with a reasonable construction of the policy. Premiums must be paid, and other conditions observed, as faithfully in marine as in other forms of insurance. Conditions may be waived also, in like manner as in other insurance, by express consent, or by conduct and circumstances from which a waiver is inferred.

Section 255rr.—DEFINITION OF MARINE INSURANCE.—Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interests in movable property, may be exposed during a certain voyage or a fixed period of time.

Civil Code, Section 2655.

Section 255ss.—INSURABLE INTEREST.—The owner of a ship has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss.

The insurable interest of an owner who has hypothecated the ship as security for a loan, to be repaid only in case the ship survives a particular risk, voyage, or period, is only

the excess of the value of the ship over the amount secured as a loan.

Freightage, in the sense of a policy of marine insurance, means all the benefits derived by the owner either from the chartering of the ship or its employment for the carriage of his own goods or those of others.

The owner of a ship has an insurable interest in expected freightage, which he would have certainly earned had it not been for the happening of a peril insured against. This interest in expected freightage exists, in the case of a charter-party, when the ship has broken ground on the charter voyage; or if a price is to be paid for the carriage of goods, when they are actually on board, or there is some contract for putting them on board and both ship and goods are ready for the specified voyage.

One who has an interest in the things from which profits are expected, has an insurable interest in the profits.

The charterer of a ship has an insurable interest in it to the extent that he is liable to be damaged by its loss.

Civil Code, Sections 2659, 2660, 2661, 2662, 2663, 2664, 2665, 3017.

Section 255tt.—PERILS OF THE SEA.—The definition of perils of the sea, covered by marine insurance, is very extensive. Perils of the sea are all perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such. They include storms and waves; rocks, shoals, and rapids; and other obstacles, though of human origin, such as floating logs, abandoned vessels, or other derelicts of the sea. They also include changes in climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers met with only upon the sea. An injury resulting from a defective condition of the ship itself, or negligent operation of the machinery, is not a peril of the sea. Thus, it has been held that the bursting of a steam boiler is not a peril of the sea, as understood in the law of marine insurance. A peril of the sea is one associated

with the peculiar character and nature of the ocean, suggesting its winds and storms and tides, its tempestuous waves, its obscuring fogs, and other dangers inevitably incident to its navigation.

Section 255uu.—DUTY OF PARTIES.—In effecting a contract of marine insurance, it is the duty of the parties, the insurer and the insured, to reveal to each other all information materially affecting the risk; unless the same facts are known to both, or which in the exercise of ordinary care either party has the means of ascertaining. Neither party can withhold from the other any information peculiarly within his own knowledge, material to the risk, and he is required to state the exact and whole truth in relation to all matters about which he makes representations, voluntarily, or in answer to inquiries made of him.

(a)—**Presumption of Knowledge of Loss.**—A person insured by a contract of marine insurance is presumed to have had knowledge, at the time of insuring, of a prior loss of the thing insured; provided, it must appear that the information might possibly have reached him in the usual mode of transmission and in the usual time.

(b)—**Concealments which only Affect the Risk in Question.**—If a party applying for a policy of marine insurance conceals facts, in respect to any of the following matters, such concealment does not make the entire contract void, but does release the insurance company from a loss resulting from the risk concealed: (1) The national character of the insured; (2) The liability of the insured property to capture and detention; (3) The liability to seizure from breach of foreign laws of trade; (4) The want of necessary documents; and (5) The use of false and simulated papers.

(c)—**Effect of Intentional False Representations.**—If the party applying for a policy intentionally makes false representations about any matter respecting the risk, whether

material or immaterial, the insurance company may rescind the entire contract.

Civil Code, Sections 2563, 2564, 2669, 2671, 2672, 2676.

Section 255vv.—WARRANTY OF SEAWORTHINESS.—In every marine insurance upon a ship, or freight, or freightage, or upon anything which is the subject of marine insurance, a warranty is implied that the ship is seaworthy.

(a)—**Seaworthiness Defined.**—A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy. A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables, anchors, cordage, sails, food, water, fuel, lights, and other necessary or proper stores and implements for the voyage.

(b)—**Different Degrees of Seaworthiness at Different Stages of the Voyage.**—Where different portions of the voyage contemplated by a policy differ, in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with if, at the commencement of each part of the voyage, the ship is seaworthy with reference to that portion.

(c)—**Delay in Making Repairs.**—When a ship becomes unseaworthy during the voyage, an unreasonable delay in making repairs will exonerate the insurance company from liability.

(d)—**Seaworthiness for Cargo.**—A ship which is seaworthy for the purpose of an insurance upon the ship may nevertheless, by reason of being unfitted to receive cargo,

be unseaworthy for the purpose of insurance upon the cargo. To be seaworthy for cargo, the vessel must be properly equipped, with competent master and officers and men, and all necessary and proper stores and implements for the voyage.

(e)—**Neutral Papers.**—Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality, and that it will not carry any documents which cast reasonable suspicion thereon.

(f)—**At What Time Seaworthiness Must Exist.**—An implied warranty of seaworthiness is complied with if the ship be seaworthy at the time of the commencement of the risk, except in the following cases: When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time; and, when the insurance is upon the cargo, which, by the terms of the policy, or the description of the voyage, or the established custom of the trade, is to be transshipped at an intermediate point, the implied warranty is not complied with, unless each vessel upon which the cargo is shipped or transshipped be seaworthy at the commencement of its particular voyage.

Civil Code, Sections 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688.

Section 255ww.—DEVIATION FROM VOYAGE.—In order to hold the insurance company liable in the event of a loss, it must appear that no material deviation from the voyage named in the policy was made. Where, for instance, a cargo of wheat was insured from San Francisco to Hong Kong, the transshipment of the wheat at Yokohama was a deviation, even though the bill of lading authorized it, because the insurance had not been effected with reference to that port.

(a)—**What Constitutes Deviation.**—Deviation is defined by the law to be a departure from the course of the voyage insured, or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage. When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between those places. If the course of sailing is not fixed by mercantile usage, the voyage insured by a policy is the way between the places specified which, to a master of ordinary skill and discretion, would seem the most natural, direct, and advantageous.

(b)—**Deviation Exonerates the Insured.**—An insurer is not liable for any loss happening subsequently to an improper deviation. But a deviation from the voyage contemplated by the policy is sometimes proper, and when properly made will not exonerate the insurer. A deviation may be properly made, when caused by circumstances over which neither the master nor the owner of the ship had any control; or, when necessary to comply with a warranty, or to avoid a peril of the sea, whether insured against or not; or, when made in good faith and upon reasonable grounds of belief in its necessity to avoid a peril to ship or cargo; or, when made in good faith for the purpose of saving human life or relieving another vessel in distress. Every deviation not specified above as being proper is pronounced by the law to be improper, and when improperly made will release the insurer from liability.

Civil Code, Sections 2692, 2693, 2694, 2695, 2696, 2697.

Section 255xx.—TOTAL AND PARTIAL LOSS.—A loss may be either total or partial. Every loss which is not total is partial. A total loss may be either actual or constructive.

(a)—**Actual Total Loss.**—An actual total loss is caused by a total destruction of the thing insured; or a loss by sinking, or by being broken up; or any damage to the insured property which renders it valueless to the owner for the purposes for which he held it; or any other event which entirely deprives the owner of the possession, at the port of destination, of the property insured. An actual loss may be presumed from the continued absence of the ship without being heard of; and the length of time which is sufficient to raise the presumption depends on the circumstances of each case.

Upon an actual total loss, a person insured is entitled to payment without notice of abandonment.

(b)—**Constructive Total Loss.**—A constructive total loss is one which gives to a person insured a right to abandon the property by declaring to the insurer that he relinquishes to him his interest in the thing insured.

(c)—**Insurance Against Total Loss.**—An insurance confined in terms to an actual total loss does not cover a constructive total loss, but covers any loss which necessarily results in depriving the insured of the possession at the port of destination of the entire thing insured.

(d)—**Liability of Insurer When Voyage is Broken Up.**—When a ship is prevented, at an intermediate port, from completing the voyage, by the perils insured against, the master must make every exertion to procure, in the same or a contiguous port, another ship, for the purpose of conveying the cargo to its destination; and when he has done so, the liability of a marine insurer of the cargo continues after it is thus reshipped. And in addition, a marine insurer is bound for damages, expenses of discharging, storage, reshipment, extra freightage, and all other expenses incurred in saving the cargo reshipped, up to the amount insured.

Civil Code, Sections 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2712.

Section 255yy.—ABANDONMENT.—A person insured by a contract of marine insurance may abandon the thing insured, or any particular portion separately valued by the policy or otherwise separately insured, and recover for a total loss thereof, when the cause of the loss is a peril insured against, in any of the following cases: (1) If more than half in value is actually lost, or would have to be expended to recover it from the peril; (2) If the property is injured to such an extent as to reduce its value more than one-half; (3) If a ship is insured, and the contemplated voyage cannot be performed without incurring an expense to the insured of more than half the value of the ship, or without incurring a risk which a prudent man would not take under the circumstances; (4) If the cargo or freightage is insured, and the voyage cannot be performed nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo, without incurring an expense of more than half the value, or without incurring a risk which a prudent man would not take under the circumstances.

Freightage cannot in any case be abandoned unless the ship is also abandoned.

An abandonment must be neither partial nor conditional. An abandonment, to give the insured the right to claim the full amount of insurance, must include not only an intention to abandon, but also a relinquishment to all right to the property. The insured must in fact and in good faith abandon the ship; and he cannot still claim ownership, or continue in the use of the vessel, after he has given notice of abandonment as for a total loss.

An abandonment must be made within a reasonable time after information of the loss, after the commencement of the voyage. Where the information upon which an abandonment has been made proved incorrect, or the property insured was so far restored when the abandonment was made that there was then in fact no total loss, the abandonment becomes ineffectual.

An abandonment is equivalent to a transfer by the insured of his interest to the insurer, with all the chances of recovery and indemnity. An acceptance of an abandonment is not necessary to the rights of the insured. But the acceptance of an abandonment, whether express or implied, is conclusive upon the parties, and admits the loss and the sufficiency of the abandonment.

An abandonment once made and accepted is irrevocable, unless the ground upon which it was made proves to be unfounded; as, where information of the loss of a ship turns out to be incorrect.

On an accepted abandonment of a ship, freightage earned previous to the loss belongs to the insurer of the freightage; but freightage subsequently earned belongs to the insurer of the ship.

(a)—**Refusal to Accept.**—If an insurance company refuses to accept a valid abandonment, it is liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured person.

(b)—**Waiver of Formal Abandonment.**—If a marine insurance company pays for a loss as if it were an actual total loss, it is entitled to whatever may remain of the property insured, or its proceeds or salvage, as if there had been a formal abandonment.

(c)—**Omission to Abandon.**—If a person insured omits to abandon, he may nevertheless recover his actual loss.

(d)—**Notice of Abandonment.**—Abandonment is made by giving notice thereof to the insurer, which may be made orally or in writing. A notice of abandonment must be explicit, and must specify the particular cause of the abandonment; but it is only necessary to state enough to show

that there is probable cause to abandon, and the notice need not be accompanied with proof of interest or of loss.

Civil Code, Sections 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2724, 2725, 2727, 2728, 2729, 2730, 2731, 2732.

Section 255zz.—MEASURE OF INDEMNITY.—A valuation in a policy of marine insurance is conclusive between the parties thereto, in the adjustment of either a partial or total loss, if the insured has some interest at risk, and there is no fraud on his part; except that when a thing has been hypothecated, before its insurance, and without the knowledge of the person actually procuring the insurance, he may show the real value. But a valuation fraudulent in fact entitles the insurer to rescind the contract.

(a)—**Partial Loss.**—A marine insurer is liable upon a partial loss, only for such proportion of the amount insured by him as the property lost bears to the value of the whole interest of the insured.

(b)—**Profits.**—Where profits are separately insured the insured is entitled to recover, in case of loss, a proportion of such profits, equivalent to the proportion which the value of the property lost bears to the value of the whole.

(c)—**Valuation Apportioned.**—In case of a valued policy on freightage or cargo, if a part only of the subject is exposed to risk, the valuation applies only in proportion to such part.

(d)—**Valuation Applied to Profits.**—When profits are valued and insured in the policy, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation in the policy fixes their amount.

(e)—**Estimating Loss Under an Open Policy.**—In estimating a loss under an open policy, where the values are

not fixed by the contract, the following rules are to be observed: (1) The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value, or which are necessary to prepare it for the voyage insured; (2) The value of cargo is its actual cost to the insured, when laden on board, or when that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board; but this must be without reference to any losses incurred in raising money for its purchase, or any drawback on its exportation, or any fluctuations of the market at the port of destination, or any expenses incurred on the way or on arrival; (3) The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it; and (4) The cost of insurance is in each case to be added to the value thus estimated.

(f)—**Arrival of Cargo Damaged.**—If cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the value which the market price at that port, of the goods damaged, bears to the market price they would have brought if sound.

(g)—**Labor and Expenses.**—A marine insurer is liable for all the expense attendant upon a loss which forces the ship into port to be repaired; and where it is agreed that the insured may perform labor for the recovery of the property, the insurer is liable for the expense incurred thereby; such expense in either case being in addition to a total loss, if that afterwards occurs.

(h)—**One-third New for Old.**—In case of a partial loss of a ship or its equipments, the old materials are to be applied towards payment for the new, when repairs are made; and whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining costs of the

repairs, except that he must pay for anchors and cannon in full, and for sheathing metal at a depreciation of only two and one-half per cent for each month that it has been fastened to the ship.

Civil Code, Sections 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2746.

Section 255aaa.—GENERAL AVERAGE.—A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard or otherwise sacrifice, any or all the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison, and the loss incurred thereby is called a general average loss.

A jettison must begin with the most bulky and least valuable articles, so far as possible.

A jettison can be made only by authority of the master of the ship, except in case of his disability or an overruling necessity, when it may be made by any other person.

The loss incurred by a jettison, when lawfully made, must be borne in due proportions by all that part of the ship, appurtenances, freightage, and cargo, for the benefit of which the sacrifice is made, as well as by the owner of the property sacrificed. The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost as the value of his part of the property affected bears to the value of the whole. An adjustment made at the end of the voyage, if valid there, is valid everywhere.

In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery, and the cargo as at the time and place of its discharge; adding, in each case, the amount made good by contribution.

The owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such voyage.

Where a person insured by a contract of marine insurance has a demand against others for a contribution, by reason of a general average, he may claim the whole loss from the insurance company, subrogating it to his own right to contribution. But no such claim can be made upon the insurer after the separation of the interests liable to contribution, nor when the insured, having the right and opportunity to enforce contribution from others, has neglected or waived the exercise of that right.

Civil Code, Sections 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2745.

Section 255bbb. — PERISHABLE GOODS. — What is known as the memorandum clause in policies of marine insurance, whereby the insurance company is exempted from liability for any partial loss of goods of a perishable nature, is intended to apply only where goods are perishable and there is difficulty in proving whether the loss occurred from the inherent quality of the goods or from a peril of the sea.

Section 255ccc.—ACTS OF MASTER AND CREW.— The insurance company will be liable notwithstanding a lack of skill, or even negligence, on the part of the master or crew. To relieve the company from liability because of acts of the master or crew, there must be want of good faith and honesty of purpose on their part. If a ship should be run on shore by the crew and wrecked, through being placed in a dangerous position by reason of negligence or unskilfulness of the crew, this does not exempt the company from liability, where it appears that the crew were not acting in bad faith and with dishonest purpose to cause loss.

Marine Insurance Agents

Section 255ddd. — PRINCIPLES OF AGENCY. — The principles of agency stated under the head of "Fire Insurance Agents" apply equally to agents of marine insurance companies. They bind their principals in the same way; their representations as to the business entrusted to them have the same effect; they may waive conditions of the contract to the same extent; and as there is no special rule applying particularly to marine insurance agents, it will be sufficient, as to them, to refer to the subject of "Fire Insurance Agents."

Building Contracts

Section 256.—CONTRACT MUST BE IN WRITING. —In California, all building contracts must be in writing when the amount agreed to be paid to the contractor exceeds one thousand dollars.

Code of Civil Procedure, Section 1183.

Section 257.—CONTRACT OR MEMORANDUM TO BE RECORDED.—The contract itself, or a memorandum of it, must be filed for record in the office of the County Recorder of the county or city and county where the property is situated, before the work is commenced. Whether the contract or a memorandum of it be filed for record, it should contain the names of all the parties to the contract; a description of the property; a statement of the character of the work to be done; the total amount to be paid under the contract; and the amounts of all partial payments, and the times when payments shall be due and payable. All contracts which are not recorded, in the manner stated above, are declared by the law of California to be wholly void, and no recovery can be had upon the contract by either party to it. The law also provides that after the expiration of two years from the date of filing of notice of

completion of any building or improvement, the County Recorder may return the contract, plans, and specifications to the person filing the same, unless he is notified in writing by some person claiming an interest in the contract or property not to do so. If no notice of completion has been filed, the Recorder may, after the expiration of two years, destroy the contract, plans, and specifications then on file in his office. Two years from the date of the new law, the Recorder may destroy all contracts, plans, and specifications which have been in his office five years. (Act of the Legislature, approved February 15, 1905.)

Code of Civil Procedure, Section 1183.

Section 258.—RECORDER'S FEE.—The law provides that the County Recorder shall receive a fee of one dollar for filing the contract or memorandum for record.

Code of Civil Procedure, Section 1183.

Section 259.—TIME OF PAYMENTS.—The building contract must not make any part of the contract price payable before the work is commenced; but the contract price must, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on completion of the whole work.

Code of Civil Procedure, Section 1184.

Section 260.—LAST PAYMENT.—The law provides that at least twenty-five per cent of the whole contract price must be made payable at least thirty-five days after the final completion of the contract. This is done to protect the liens of laborers, mechanics, and materialmen, and to protect the owner by giving sufficient time for all liens to come in before the final payment is to be made by him.

Code of Civil Procedure, Section 1184.

Section 261.—CONTRACTOR'S BOND.—The Legislature of 1893 passed a law, which provided that every contract filed for record should be accompanied by a bond in an amount equal to at least twenty-five per cent of the contract price. This law also provided that the bond should be made to apply to the benefit of any and all persons performing labor or furnishing materials to the contractor, and that such persons might recover the value of labor or materials furnished from the bondsmen, not exceeding the amount of the bond, with costs and attorney fees; and the law also provided, that any failure to file the bond would make the owner and contractor both liable in damages to any and all materialmen, laborers, and sub-contractors entitled to liens upon the property. The law was generally recognized, and bonds were filed under it, ever since its passage by the Legislature in 1893. But the Supreme Court of California has decided that the law is unconstitutional and void. In San Francisco, Wm. Shaunessy sued the American Surety Co. on a contractor's bond, filed under the law. Shaunessy was a material-man who furnished materials to the contractor. The Supreme Court decided that the law requiring the bond is unconstitutional, and the bond is void. (Decided by the Supreme Court of California in the case of Wm. Shaunessy vs. the American Surety Co., which decision is printed in Volume 23 of California Decisions, page 800.)

Section 262.—MATERIALS FURNISHED CONTRACTOR EXEMPT FROM EXECUTION.—Materials furnished for use and about to be used in the construction, alteration, or repair of any building cannot be taken under attachment or execution, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase price of the materials.

Code of Civil Procedure, Section 1196.

Section 263.—FORM OF BUILDER'S CONTRACT.—The following is a form of builder's contract, which is in common use in this State, and which meets the requirements of the law in its terms:—

ARTICLES OF AGREEMENT, Made this .... day of ....., 190.., Between .....
....
of the ....., County of ....., State of California, the party of the first part, and .....
....
of the ....., County of ....., State of California, the party of the second part.

Witnesseth:—The party of the first part will be hereinafter designated as the Owner, and the party of the second part as the Contractor, singular number only being used; and the word Architect used herein in the singular shall include the plural, and the masculine the feminine.

FIRST.—The Contractor agrees, within the space of ..... working days from and after the date hereof, to furnish the necessary labor and materials, including tools, implements, and appliances required, and perform and complete in a workmanlike manner all the....
....
....
(Here insert description of work to be done, under the
....
contract, whether woodwork, plastering, plumbing, ironwork, etc.)
....
and other works shown and described in and by, and in conformity with, the plans, drawings, and specifications for the same made by ....., the authorized Architect employed by the Owner, and which are signed by the parties hereto.

SECOND.—Said Architect shall provide and furnish to the Contractor all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith under the direction and supervision and subject to the approval of said Architect, or a Superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications.

THIRD.—The time during which the Contractor is delayed in said work by the acts or neglects of the Owner or his employees, or those under him by contract or otherwise, or by the acts of God which the Contractor could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by any strikes, boycotts, or like obstructive action by employee or labor organizations, or by lock-outs or other defensive action by employers, whether general, or individual, or by organizations of employers, shall be added to the aforesaid time for completion.

FOURTH.—Said building .....
....
....
to be erected upon a lot of land situated in .....
....., County of .....,
State of California, and described as follows: .....
....
....
(Here insert description of the lot of land.)
....
....

FIFTH.—The Owner agrees, in consideration of the performance of this agreement by the Contractor, to pay, or cause to be paid, to the Contractor, his legal representative or assigns, the sum of .....
(Here insert contract price.)
..... Dollars, in United States Gold Coin, at the times and in the manner following, to-wit: .....Dollars when the foundation is completed and the framing materials on the ground and the frame up; ..... Dollars when the roof and rustic are on; ..... Dollars when the plastering is completed; and .....
Dollars thirty-five days after the completion of the building and acceptance by the Owner; .....
....
(Here insert any other condition as to payment desired.)
....
Provided, that when each payment or installment shall become due, and in the final completion of the work, certificates in writing shall be obtained from the said Architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and

the said Architect shall at said times deliver said certificates under his hand to the Contractor, or, in lieu of such certificates shall deliver to the Contractor in writing under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the Contractor to the certificate or certificates. And in the event of the failure of the Architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the Contractor, the amount which may be claimed to be due by the Contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable, and the Owner shall be liable and bound to pay the same on demand.

In case the Architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the Contractor with the requirements of said writing shall entitle the Contractor to the certificate.

SIXTH.—For any delay on the part of the Owner in making any of the payments or installments provided for in this contract after they shall become due and payable, he shall be liable to the Contractor for any and all damages which the latter may suffer; and such delay shall, in addition, operate as an additional extension of the time for completion aforesaid for the length of time of such delay. And such delay, if for more than five days after the date when said payments or installments shall have respectively become due and payable, as in this agreement provided, shall, at the option of the Contractor, be held to be prevention by the Owner of performance of this contract by the Contractor.

SEVENTH.—The specifications and drawings are intended to cooperate, so that any work exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this agreement, or that is not actually descriptive of the work to be done thereunder, or of the manner in which the said

work is to be executed, shall be considered as any part of this agreement, but shall be utterly null and void.

EIGHTH.—Should the Owner or the Architect at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from, this contract, or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to, or deducted from, the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof.

NINTH.—The rule of practice to be observed in the fulfilment of the last foregoing paragraph (eighth) shall be that, upon the demand of either the Contractor, Owner, or Architect, the character and valuation of any or all changes, omissions, or extra work, shall be agreed upon and fixed in writing, signed by the Owner, Architect, and the Contractor, prior to execution.

TENTH.—Should any dispute arise between the Owner and Contractor, or between the Contractor and Architect, respecting the true construction of the drawings and specifications, the same shall, in the first instance, be decided by the Architect; but should either of the parties hereto be dissatisfied with the justice of such decision, or should any dispute arise between the parties hereto respecting the valuation of the extra work, work done, or work omitted, the disputed matter shall be referred to, and decided by, two competent persons who are experts in the business of building,—one to be selected by the Owner or Architect, and the other by the Contractor; and, in case they cannot agree, these two shall select an umpire, and the decision of any two of them shall be binding on all parties.

ELEVENTH.—Should the Contractor fail to complete this contract, and the works provided for therein, within the time fixed for such completion, due allowance being made for the contingencies provided for herein, he shall become liable to the owner for all loss and damages which the latter may suffer on account thereof, but not to exceed the sum of $..... per day for each day said work shall remain uncompleted beyond such time for completion.

TWELFTH.—In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake, or other act of God which the Contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the Owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this contract; and the loss occasioned thereby, and to be sustained by the Contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract.

In the event of a partial destruction of said work by any of the causes above named, then the loss to be sustained by the Owner shall be in the proportion that the amounts of installments paid or due bears to the total amount of work done and materials furnished, estimated according to said contract price, and the balance of said loss to be sustained by the Contractor.

THIRTEENTH.—The payment of the progress payments by the Owner shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work is to be subjected to inspection and approval of the Architect or Superintendent at the time when it shall be claimed by the Contractor that the contract and works are completed; but the Architect or Superintendent shall exercise all reasonable diligence in the discovery, and report to the Contractor, as the work progresses, of materials and labor which are not satisfactory to the Architect or Superintendent, so as to avoid unnecessary trouble and cost to the Contractor in making good defective parts.

FOURTEENTH.—Should the Contractor, at any time during the progress of the work, refuse or neglect, without the fault of the Owner, Architect, or Superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein, or any lawful extension thereof, for a period of more than three days after having been notified by the owner in writing to furnish the same, the Owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expenses thereof shall be deducted from the amount of the contract price.

IN WITNESS WHEREOF, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

.....(Seal.)
.....(Seal.)

Section 264.—REFERENCE TO PLANS AND SPECIFICATIONS IN CONTRACT.—Where a building contract provides that the contractor shall do the work according to certain drawings and specifications, which are referred to in the contract as "hereto annexed," the drawings and specifications are an essential part of the contract, and until they are annexed the contract is not complete; and it is essential that the drawings and specifications referred to in the contract should be filed in the Recorder's office, together with the contract, and a failure to file them destroys the validity of the contract.

Section 265.—WHEN CONTRACT WHOLLY VOID.—The failure to file the contract, or a memorandum containing the statements required by the law above mentioned, in the office of the County Recorder, renders the contract wholly void for all purposes. It cannot then be the basis of a recovery by the contractor against the owner, nor can it be looked to for the purpose of determining the amount for which the owner is liable, or when payment is to be made. In any action against him by a laborer or material-man, their rights will be determined by other rules, and irrespective of any provision of such contract.

Section 266.—DEFECTS WHICH WILL NOT MAKE CONTRACT VOID.—The law of California does not make a contract void for any other defect or default than a failure to record it. The contract is not rendered void by the fact that the final payment is specified to become due thirty days after the completion of the building, instead of thirty-five days, as provided by law; nor is the contract rendered

void by the fact that the property or lot is erroneously described; and, indeed, the statute only declares the contract void for one reason, failure to file it, or a memorandum of it, in the office of the County Recorder.

Section 267.—TWENTY-FIVE PER CENT RESERVED.—The owner of a building, after its completion by the contractor, must reserve in his hands twenty-five per cent of the whole contract price for thirty-five days, for payment to the contractor or lien-claimant, whichever is entitled to it; and if there is a contest between the contractor and any person who has filed a lien, the owner should deposit the money in court, to be awarded to the party entitled to it.

A building contract which omits to provide for the final payment of twenty-five per cent of the contract price at least thirty-five days after completion thereof is void as to all persons furnishing material or performing labor upon the building. (Decided by the District Court of Appeals, in the case of Stimson Mill Co. vs. M. J. Nolan, which decision is printed in Volume 4, California Appellate Decisions, page 731.)

Section 268.—BUILDING CONTRACT WHERE PRICE DOES NOT EXCEED ONE THOUSAND DOLLARS.—A building contract, where the price does not exceed one thousand dollars, and where the work is to be done within a year, may be entered into orally. The law relative to the mode of payment of the contract price of a building does not apply to such contracts when the price does not exceed one thousand dollars, but applies only to such contracts when the price exceeds that sum. No part of the contract price under a building contract, when the price does not exceed one thousand dollars, need be withheld by the owner, and he may pay the whole of it to the contractor before the commencement or after the

completion of the work, unless he is notified not to do so by some person who claims a lien.

Section 269.—CONTRACT OF MINOR.—A minor is not bound by his contract for the erection or repair of a building. A minor is only bound by his contracts in certain cases, which form exceptions to the general rule that minors cannot make contracts, in which the erection of a building is not included.

Section 270.—PRICE WHERE CONTRACTOR ABANDONS THE WORK.—If the contract for the erection and completion of a building is entire, and the contractor abandons the work before it is completed, he loses the right which he would have had to the full compensation agreed on.

Section 271.—OWNER PREVENTING WORK.—Where a contractor has proceeded to construct a building of the material and in the manner substantially as provided for in the contract, and the owner before completion of the contract, and without cause, and in violation of the contract, refuses to allow the contractor to go on, and takes possession of the building, and appropriates to his own use the materials on hand for the construction of the building, the contractor is entitled to treat the contract as rescinded. And in other circumstances, where acts of similar character by the owner prevent the contractor from completing the work as agreed upon, the contractor may look upon the contract as rescinded. In all such cases, the contractor may recover from the owner the reasonable value of the work performed and material furnished by him.

Section 272.—NOTICE TO OWNER.—The law requires recording of a building contract, where the price exceeds one thousand dollars, as a condition of its validity, and forbids any payment by the owner to the contractor as

against material-men and laborers, unless the contract is recorded. No notice to the owner to stop payments to the contractor is required, unless there is a valid contract. If the contract is not recorded, it is void, and no notice to the owner is necessary.

Section 273.—ACCEPTANCE BY AGENT.—Where the parties to a building contract agree upon an agent, who is authorized to accept or reject the work when completed, his acceptance is binding upon both parties; and where the agent acts in good faith, and without practicing any fraud upon either party to the contract, his acceptance of the work is final and conclusive.

Section 274.—BREACH OF CONTRACT BY OWNER.—Where a contractor agrees to perform certain work and furnish certain materials for the construction of a building, and after furnishing a portion of the materials the owner of the building stops the work, and fails to receive any further material from the contractor, the owner is liable to the contractor in damages. The contractor may recover from the owner as damages all the profits he would have made if the work had gone on and the materials had been received from him.

Section 275.—AGREEMENT AS TO EXTRA WORK.—Where a building contract provides that "no extra work is to be paid for except by contract in writing," the parties may verbally rescind this provision, at any time, and agree to alterations. Where alterations are made by agreement, written or verbal, the original contract is not set aside, but is only modified to the extent of the change in the plans.

Section 276.—LOSS BY FIRE BEFORE COMPLETION.—Where, by the terms of a building contract, the third and last installments of payment for the work are conditioned upon its completion according to agreement

and specifications, such installments cannot be recovered where the whole work is consumed by fire, without apparent fault of either party, before its completion. A question will arise under such circumstances as to whether the building was substantially completed at the time of the fire. In a suit between a contractor and owner, at San Francisco, the Supreme Court of California decided that where it was proved that no part of the second coat of paint required by the contract had been put on; that the work bench of the carpenters and the paint for the second coat were in the building at the time of the fire; that two of the doors were unhung, and no fastenings put on the front door or windows; and that the house had not been delivered nor accepted; the building was not substantially completed before the fire. (Decided by the Supreme Court of California in the case of Clark vs. Collier, which decision is printed in Volume 100 of the California Reports, page 256.) So many things were lacking in the case quoted, that it would have been surprising indeed if the Supreme Court had decided that the work was substantially performed; and in all cases the question, whether a contract has been substantially performed before a fire, will depend upon the terms of the contract and a reasonable consideration of the work done and remaining to be done.

Section 277.—CONTRACT PROVIDING FOR ARBITRATION.—Where a building contract provides for the arbitration of any matter, the contractor must first demand an arbitration before he can sue for his pay for the work included in the provision for arbitration. For instance, the contractor is not entitled to recover for extra work, or for materials furnished, when the contract provides that claims for such extras must be submitted to arbitration, and the contractor has made no offer or request to arbitrate. The contractor must offer in good faith to arbitrate, and if the owner refuses, he may then sue for and recover

the value of the extra work, regardless of the arbitration clause.

Section 278.—SUIT FOR REASONABLE VALUE OF WORK AND MATERIALS.—Although a written contract, required by the law where the contract price is for more than one thousand dollars, was not recorded, and is therefore void for all purposes, yet the contractor is not to go without his money. He may sue the owner for the reasonable value of the labor and materials furnished, and the courts will give him judgment for the amount. The written contract, by reason of not being filed for record, is absolutely void, and cannot be put in evidence to prove the value of the work or materials furnished by the contractor. The value, in such a suit, will have to be proved by the testimony of people who are familiar with the work and materials, and their value at the particular place; and, of course, the testimony of the contractor, or the architect, will have much weight in determining the value of the work and materials.

Section 279.—INVALID MEMORANDUM.—Where the memorandum of a building contract, filed with the County Recorder, does not state of what material the building is to be constructed, whether of wood, brick, stone, or iron, but merely describes it as a building of a certain size, to be constructed in a workmanlike manner according to plans and specifications, and a copy of the plans and specifications is not filed or inserted in the memorandum, the contract is void. The contract is void upon the ground that the memorandum does not contain a sufficient statement of the general character of the work to be done. The law is very strict with reference to building contracts, because the rights of the parties to a building contract are entirely statutory. The express provision of the law is, if the contract or a valid memorandum thereof is not filed with the County Recorder, the contract is void.

Section 280.—SUBSTANTIAL PERFORMANCE.—In certain cases, the contractor, although he has not completed the work literally as called for by the contract, yet may recover from the owner the contract price, less damages suffered by the owner from the contractor's failure to do the work as contracted for. But the contractor must show in such cases that the failure was not by his own fault; that he endeavored and intended in good faith to do the work exactly as contracted for; and he must also be able to show that the work has been in every material particular performed substantially in the manner called for by the contract. The contractor must have intended in good faith to comply with the terms of the contract. The spirit of the contract must be faithfully observed, though the very letter of it fail. Good faith alone, however, is not enough. The owner has a right to a structure in all essential particulars such as he has contracted for, and to authorize a court or jury to find that there has been a substantial performance, it must be found that he has such a structure. The court cannot say that anything is immaterial, which the parties have made material by their own agreement. The owner has a right to have the structure he contracted for, and not another; and even his caprices, if expressed in the contract, must be complied with, even though they do not add to the value of the building, or may have lessened its value. It is only where the plan has been substantially embodied in the work that the contractor will have a remedy for substantial performance. The omissions or deviations from the plans must be the result of a mistake or inadvertance, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the owner substantially what he contracted for. Some of the things which will not be considered as substantial performance of a building contract are mentioned in the suit brought at San Francisco by Edward H. Perry against Thomas M. Quackenbush, and

decided by the Supreme Court of California. The contractor agreed in the construction of the foundation to use good, hard brick and lay seven courses, and to construct twelve piers of brick laid in six courses. In violation of the agreement, he used old, second-hand brick of poor quality, that had been used in other buildings, and laid the same in courses of five and six instead of seven, and constructed only six piers of brick of the same kind laid in three courses. He agreed to use in the construction of the frame of said building the best kind of lumber; contrary to his agreement, he used only second-class lumber and second-hand and refuse lumber that had been used in other buildings. He agreed to use in the construction of the roof the best quality of shingles; contrary to his agreement, he used second-hand lumber and second-class shingles. He agreed to paint the building with two coats of metallic paint, but used no metallic paint at all, but cheap and inferior paint. The Supreme Court held that these facts showed that the contractor had in no sense substantially performed his agreement, but that he had intentionally and wilfully departed from it. (Decided by the Supreme Court of California in the case of Edward H. Perry vs. Thomas M. Quackenbush, which decision is printed in Volume 105 of the California Reports, page 299.)

Section 281.—OWNER NOT LIABLE FOR DAMAGES ON UNRECORDED CONTRACT.—A contractor for the erection of a building cannot maintain a suit against the owner to recover damages for not being allowed to complete the building, if the contract price was over one thousand dollars, and the contract was not filed for record as required by the law.

Section 282.—RIGHT OF CONTRACTOR TO ABANDON WORK.—If the owner prevents the progress of the work, or fails to furnish materials with which the work can be done, where the owner is to furnish the materials,

or fails to pay an installment of the price when it becomes due, the contractor has the right to abandon the work and sue the owner for the reasonable value of his work and materials. The contractor has no right to leave the work without cause; and if, when he makes a demand for an installment of the price, he has not performed the contract according to its terms, the installment is not legally due, and he will not be justified in leaving the work on the ground of non-payment.

Section 283.—MATERIAL DEPARTURE FROM SPECIFICATIONS.—A building contractor must stick close to the plans and specifications, and must make no changes or deviations without the consent of the owner. Any material departure from the plans and specifications by the contractor will render him liable to the owner in damages, and may give the owner the right to rescind the contract altogether. Where a building contract called for laths one and one-quarter inches wide, and laths one and one-half inches wide were used, and the contract called for No. 1 rustic and the best quality of joists and studding, and the contractor used second quality of joists and studding and No. 2 rustic, it has been decided by our Supreme Court that there was a substantial and material departure from the specifications of the contract.

Section 284.—EXCAVATIONS.—The question whether the owner of land will be liable in damages, for injury to adjoining property, caused by excavating, will depend in every case upon the manner of making the excavation. The owner of a lot in making excavations must use due care. If one by carelessness in making excavations on his own land causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable in damages. The law exacts from a person who undertakes even a lawful act on his own premises from which injury might be apprehended to the property

of his neighbor, the exercise of a degree of care measured by the danger, to prevent or lessen the injury. The general rule is, that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights of his neighbor to the use of his property, so that each in exercising his right must do no act which causes injury to his neighbor. But if the owner of the land, in making excavations, performs the work in a proper and careful manner, he will not be liable for injury to the premises of an adjoining owner. He is required only to take reasonable precaution to sustain the land of the adjoining owner. The adjoining owner must also take precaution to sustain his own walls, after notice of the intended excavations. The party intending to make excavations must give notice to the adjoining owner. This notice may be verbal or written. The notice is not required to be in any particular form. In one case decided by the Supreme Court of California, it was held that the following notice was entirely sufficient: "Dear Madam: As we are about to excavate the premises on the southeast corner of Haight and Devisadero Streets, directly adjoining your lot, to a depth somewhat below your foundation, you are hereby notified to take the necessary measures to protect your property. Very respectfully, Cunningham Bros., Architects. For Christian Warneke." (Decided by the Supreme Court of California, in the case of Nippert vs. Warneke, which decision is reported in Volume 128 of the California Reports, page 501.)

Civil Code, Section 832.

Section 284a.—UNSAFE SCAFFOLDING, LADDERS, ETC.—Any person or corporation employing or directing another to do or perform any labor in the construction, alteration, repairing, painting or cleaning of any house, building or structure within this State, who knowingly or negligently furnishes or erects or causes to be furnished or erected for performance of labor, unsafe or improper

scaffolding, slings, hangers, blocks, pulleys, stays, braces, ladders, irons, ropes or other mechanical contrivances; or who hinders or obstructs any officer attempting to inspect the same; or who destroys, defaces, or removes any notice posted thereon by such officer; or who permits the use thereof, after the same has been declared unsafe by such officer; is guilty of a misdemeanor.

Act of the Legislature, approved March 13, 1909.

Section 284b.—TEMPORARY FLOORING FOR PROTECTION OF WORKMEN.—The Legislature of 1909 passed a law, providing for temporary flooring in buildings under construction, for the protection of workmen. This law reads as follows:

"Any building more than three stories high in the course of construction shall have the joists, beams or girders of each and every floor below the floor or level where any work is being done or about to be done, covered with flooring laid close together, or with other suitable material, to protect workmen engaged in such building from falling joists or girders, and from falling bricks, rivets, tools and other substances whereby life and limb are endangered.

It shall be the duty of the contractor having charge of such building to provide the flooring as herein required.

It shall be the duty of the owner of such building to see that the contractor carries out the provisions of this act.

Should the owner of such building let a contract for the construction of the class of building as herein provided to more than one contractor it shall then be the duty of the owner to provide the flooring as herein required.

Failure upon the part of the owner or contractor to comply with the provisions of this act shall be deemed a misdemeanor and shall be punishable as such."

Act of the Legislature, approved March 6, 1909.

Mechanic's Lien

Section 285.—THE PERSONS ENTITLED TO LIENS.—The Legislature has provided for a class of persons who may have preferred liens upon real property for the money due them. The statute includes mechanics, material-men, contractors, sub-contractors, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to or repair of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road, or other structure, as the persons who are entitled to a lien upon the property for the value of their labor or materials furnished.

Code of Civil Procedure, Section 1183.

Section 286.—TO WHAT LIEN EXTENDS.—In case of a contract for the work, between the reputed owner and the contractor, the lien extends to the entire contract price, and such contract operates as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and after all other liens are satisfied, the contractor himself may have a lien for any balance due in his own favor.

Code of Civil Procedure, Section 1183.

Section 287.—ADVANCE PAYMENTS DO NOT AFFECT LIEN.—No payment made before it is due, under the terms and conditions of the contract, will be allowed to defeat or affect any lien in favor of any person, except the contractor. As to all persons except the contractor himself, all advance payments, or payments made before they are due under the contract, are considered by the law as if they had never been made, and the amount is still applicable to liens, even where the contractor to whom the money was paid afterwards abandons his contract or

becomes liable to the owner for damages for not performing it. The owner will take his chances, if he pays the contractor in advance, and cannot be allowed to thus shut out any lienholder and deprive him of the benefit of the money due on the contract.

Code of Civil Procedure, Section 1184.

Section 288.—ALTERATION OF CONTRACT DOES NOT AFFECT LIEN.—No alteration of a building contract affects any lien provided for by the law.

Section 289.—NOTICE TO REPUTED OWNER.—Any of the persons entitled to liens mentioned in Section 285, except the contractor, may at any time give to the reputed owner of the property a notice in writing that they have performed labor or furnished materials, or both, to the contractor or other person acting by authority of the reputed owner. The notice must state in general terms the kind of labor and materials, the name of the person to whom they were furnished, the name of the person who performed the labor or furnished the materials, and the value of the labor or materials already furnished and that agreed to be furnished. The written notice must be delivered to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the claim or improvement. No such notice is invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the matters above stated, or to put him upon inquiry as to such matters. Upon such notice being given, it shall be the duty of the person who contracted with the contractor to withhold from him sufficient money due or that may become due to answer any claim and any lien that may be filed.

Code of Civil Procedure, Section 1184.

Section 290.—WHAT INTEREST IN THE LAND SUBJECT TO THE LIEN.—The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the premises, so much as may be required for convenient use and occupation, is subject to the lien; provided, that at the time of the commencement of the work, or when the materials were furnished, the land belonged to the person who caused the work to be done or materials furnished. If the land, at the time of the commencement of the work, or when the materials were furnished, did not belong in fee simple to the person who caused the work to be done or materials furnished, then only his interest in the land, whatever it was, is subject to the lien.

Code of Civil Procedure, Section 1185.

Section 291.—EFFECT OF MECHANIC'S LIEN.—Mechanic's liens are preferred liens. That is, they must be satisfied before any mortgage, or other encumbrance, put on the property after the date when the building or other structure was commenced, or work done, or materials commenced to be furnished; and a mechanic's lien must be paid before any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building or other structure was commenced, work done, or materials commenced to be furnished.

Code of Civil Procedure, Section 1186.

Section 292.—OWNER'S NOTICE OF COMPLETION.—Under the law, the owner of the building or other structure must, within ten days after the completion of the contract, or within forty days after cessation from labor upon any unfinished contract, or upon any unfinished building, file for record in the office of the County Recorder of the county in which the property is situated a written notice of completion. This notice by the owner must state

the date when the building was actually completed, or in case of cessation from labor for thirty days, the date on which labor actually ceased; the name and the nature of the title to the property of the person who caused the building or other structure to be erected or repaired or altered or added to; and also a description of the property sufficient for identification. The notice must be sworn to by the owner or some other person in his behalf.

Code of Civil Procedure, Section 1187.

Section 293.—EFFECT OF FAILURE TO FILE OWNER'S NOTICE.—If the owner neglects to file the notice of completion for record, the law provides, as a penalty for this failure, that he cannot make any defense to a suit to foreclose a mechanic's lien on the ground that the lien was not filed in time.

Section 294.—FEE FOR RECORDING OWNER'S NOTICE.—The fee to be paid the County Recorder, for recording the owner's notice of completion, is the sum of one dollar.

Section 295.—TIME WITHIN WHICH ORIGINAL CONTRACTOR MAY FILE LIEN.—Every original contractor, at any time after the completion of his contract, and until the expiration of sixty days after the filing of the owner's notice, may file a lien on the property; provided, all liens must be filed within ninety days after completion.

Code of Civil Procedure, Section 1187.

Section 296.—TIME WITHIN WHICH MECHANIC, MATERIAL-MAN, OR LABORER MAY FILE LIEN.—Every person, except the original contractor, claiming the benefit of the lien law, may file a lien on the property at any time after the completion of the building or structure, or completion of any alteration, addition, or repairs, and until the expiration of thirty days after the filing of

the owner's notice; provided, all liens must be filed within ninety days after completion.

Code of Civil Procedure, Section 1187.

Section 297.—TIME WITHIN WHICH MINER MAY FILE LIEN.—Every person who has performed labor in a mining claim, may file a lien on the property to secure his pay, at any time within thirty days after the completion of his labor.

Code of Civil Procedure, Section 1187.

Section 298.—CLAIM OF LIEN TO BE FILED IN RECORDER'S OFFICE.—The claim of lien must be filed for record with the County Recorder of the county where the property or some part of it is situated. The claim of lien must be in writing, and the law specifies the particular statements it must contain. It must contain, first, a statement of the demand for which the lien is filed, giving the amount after deducting all just credits and offsets. It must also contain the name of the owner or reputed owner of the property, if known, and also the name of the person by whom the claimant was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract. The claim must also contain a description of the property to be charged with the lien, sufficient for identification. The claim must be verified, and should be sworn to by the claimant.

Code of Civil Procedure, Section 1187.

Section 299.—OCCUPATION OR USE OF BUILDING EQUIVALENT TO COMPLETION.—In all cases the occupation or use of a building, or structure, by the owner or his agent, will be deemed equivalent to its completion for all the purposes of the lien law. So, also, acceptance of the building by the owner or his agent, and cessation from labor for thirty days upon any contract, or on any

building or structure, will be deemed equivalent to its completion.

Code of Civil Procedure, Section 1187.

Section 300.—LIENS UPON TWO OR MORE PIECES OF PROPERTY.—In every case in which one claim is filed against two or more separate and distinct buildings, mining claims, or other improvements, owned by the same person, the claim filed must designate the amount due on each of such buildings, mining claims, or other improvements; and if this is not done, the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated, upon either of such buildings, or other improvements, or upon the land, as against other creditors having liens by judgment, mortgage, or otherwise.

Code of Civil Procedure, Section 1188.

Section 301.—WHEN SUIT MUST BE COMMENCED TO FORECLOSE LIEN.—A suit to foreclose a lien upon any building, mining claim, improvement, or structure, must be commenced within ninety days after the claim of lien was filed for record; or, if a credit be given to the owner, then the suit must be commenced within ninety days after the expiration of the term of credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.

Code of Civil Procedure, Section 1190.

Section 302.—LIENS ON LOTS IN INCORPORATED CITIES AND TOWNS.—Any person who, at the request of the reputed owner of any lot in any incorporated city or town in California, grades, fills in, or otherwise improves the lot, or the street or sidewalk in front of or adjoining it, or who constructs any areas, vaults, cellars, or rooms, under the sidewalk, or makes any improvements in connection

therewith, has a lien upon such lot for his work done and materials furnished. A claim of lien should be filed in the Recorder's office, although the statute does not speak of filing a claim for such a lien.

Code of Civil Procedure, Section 1191.

Section 303.—NOTICE BY OWNER THAT HE WILL NOT BE RESPONSIBLE.—The owner of any lots or land, or the owner of a mining claim, will be liable for liens for materials, and for work or labor of every kind, used in or upon buildings or other improvements put on his land with his knowledge, if he stands carelessly by and takes no action to protect himself. The law provides that the owner may, within ten days after he has obtained knowledge of the building operations or other improvements on his land, give notice that he will not be responsible for the same. The notice must be in writing, and must be posted in some conspicuous place on the land, or on the building or other improvement situated thereon; or a copy of the notice must be filed and recorded in the office of the County Recorder of the county where the land is situated. The posting of a notice on land within ten days after the owner obtains knowledge of the commencement of the erection of any building or construction of any improvement thereon, or the filing and recording of a copy of such notice in the office of the County Recorder, stating that the owner of the land will not be responsible, will relieve the owner and the land from any liability for such building or improvement. Machinery leased, or bought on the installment plan, and used on a mining claim, will also be liable for liens for work or materials on the mining claim, unless the lessor or owner of the machinery gives a similar notice by posting or recording within ten days after the machinery is delivered at the mining claim. (Code of Civil Procedure, Section 1192, as amended March 18, 1907.)

Section 304.—MEASURE OF RECOVERY BY CONTRACTOR.—The contractor is entitled to recover upon

a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished.

Code of Civil Procedure, Section 1193.

Section 305.—CONTRACTOR MUST DEFEND SUITS ON LIENS AT HIS OWN EXPENSE.—In all cases where a lien is filed for work done or materials furnished to any contractor, he must defend any suit brought to foreclose the lien, at his own expense. While any such suit is going on, the owner may withhold from the contractor the amount of money for which the suit was filed; and in case of judgment against the owner or his property, upon the lien, the owner is entitled to deduct the amount of the judgment and costs from the amount due or to become due by him to the contractor. If the amount of the judgment exceeds the amount due by him to the contractor in full, he is entitled to sue and recover from the contractor any amount paid by him in excess of the contract price.

Code of Civil Procedure, Section 1193.

Section 306.—ORDER IN WHICH LIENS APPLY.—The Supreme Court has decided that the provision of Section 1194 of the Code of Civil Procedure, that persons performing manual labor shall be first paid, and that material-men shall have no lien except on any balance remaining after laborers are paid, is unconstitutional and void. Mechanics, artisans, material-men and laborers must be placed in the same class. Where different liens are filed against any property, by a number of persons, the law declares which shall have the preference, and they have preference and must be paid in the order named: First, all mechanics, artisans, laborers and material-men; second, sub-contractors; third, contractors. These are the three classes of liens, and the proceeds of sales of property under a lien must be paid to the classes in the order named. (Decided by the

Supreme Court of California, in the case of Mrs. Paul Miltimore vs. Nofziger Brothers Lumber Company, which decision is printed in Volume 33, California Decisions, page 446.)

Where there is no valid contract, the priority of liens is to be determined by the time the work was done or the materials commenced to be furnished. (Decided by the Supreme Court of California, in the case of Burnett vs. Glas, which decision is printed in California Decisions, Volume 36, page 204.)

Section 307.—LIEN MAY BE WAIVED AND PERSONAL ACTION BROUGHT.—The laborer, mechanic, or material-man, to whom money is due on a building contract, is not compelled to file a lien or seek to recover his money in that way. He may bring a personal action against the owner or contractor, who is indebted to him, for the unpaid portion of the contract price, without seeking to enforce a lien against the building.

Code of Civil Procedure, Section 1197.

Section 308.—WHAT IS APPLIED TO LIENS WHEN CONTRACTOR ABANDONS THE WORK.—If the contractor fails to perform his contract in full, or abandons the work before completion, the portion of the contract applicable to the liens of other persons is fixed by estimating the value of the work already done and materials furnished, including materials then actually delivered or on the ground, and deducting the payments then due and actually paid to the contractor; and the remaining portion of the contract price must be applied to such liens. In such cases, the value of the work already done and materials furnished must be estimated as near as may be by the standard of the whole contract price.

Code of Civil Procedure, Section 1200.

Section 309.—FALSE CLAIMS.—Any person who intentionally gives a false notice of his claim to the owner

forfeits his lien. Any person who intentionally includes in his claim, filed with the County Recorder, work not performed or materials not furnished for the property described in the claim, forfeits his lien.

Code of Civil Procedure, Section 1202.

Section 310.—CONSPIRACY BETWEEN OWNER AND CONTRACTOR.—If the owner and contractor conspire together and make the written contract filed show the contract price to be less than it really is, then the contract is wholly void; and in all such cases the labor done and materials furnished by all persons, except the contractor, are deemed in law to have been done and furnished at the personal request of the owner, and liens can be filed for the work or materials furnished.

Code of Civil Procedure, Section 1202.

Section 311.—BUILDING CONSTRUCTED UNDER DISTINCT CONTRACTS—WHO IS ORIGINAL CONTRACTOR.—Where a building is constructed under distinct contracts for the different departments of work involved, each person contracted with is an original contractor, and can file his claim of lien within sixty days after the completion of his contract, irrespective of the time when the entire building is completed. The provisions of the Code relating to mechanic's liens do not contemplate that there can be no original contractor except for the entire work of constructing the building. For the purpose of constructing the building, the owner may enter into different original contracts, for the different departments of work involved. If the owner should enter into a contract with one person for the construction of a building in all its parts, except the painting, and should afterwards enter into a contract with another person to do the painting of the building, each of these individuals would be an original contractor, within the meaning of the law. The laborers and material-men under each contractor would be entitled

to a lien, and it would be immaterial when the building was completed. The contract price with each contractor would be the limit of the owner's liability for such liens.

Section 312.—ALLOWANCE OF INTEREST.—Where the contract prescribes the time of payments, and a suit is brought to foreclose a lien, the court will allow interest on the amount found due from the time when it should have been paid to the date of entering the judgment, at the rate of seven per cent per annum; and, where no time for payment is specified in the contract, interest will be allowed from the date when the complaint to foreclose the lien was filed in the Clerk's office.

Section 313.—ATTORNEY'S FEES.—The court cannot allow, in suits to foreclose mechanic's liens, any attorney's fees to any lien claimant. The law until recently had been for many years that a person foreclosing a mechanic's lien would be allowed reasonable attorney's fees, in both the Superior and Supreme Courts; but the Supreme Court of California has rendered a decision, in a suit brought to foreclose a mechanic's lien, declaring the law allowing an attorney's fee unconstitutional and void. In San Francisco, the Builders' Supply Depot foreclosed a lien for materials and labor furnished in the construction of a building. The Superior Court allowed the plaintiff attorney's fees and included such fees in the judgment. The defendants appealed the case to the Supreme Court, and this court has decided that attorney's fees cannot be allowed, and that the Code law giving such fees is void. The court says: "The court allowed an attorney's fee in each of the cases, and appellants contend that such allowance was erroneous because the statutory provision directing the allowance of such a fee is unconstitutional and void. In our opinion this contention must be sustained. In a few instances this court has affirmed judgment for plaintiffs in mechanic's lien cases which included attorney's fees; but our attention has not

been called to any case where the question of the constitutionality of the statute providing for such fees has been raised, or presented to the court for adjudication. In the case at bar the question has been for the first time raised." The court decides that the expense of filing the liens may be allowed as costs of suit, but that no attorney fee can be lawfully claimed or allowed. (Decided by the Supreme Court of California in the case of Builders' Supply Depot vs. Dennis O'Conner, which decision is printed in Volume 33, California Decisions, page 97.)

Section 314.—WHEN LIEN FOR MATERIALS BEGINS.—A lien for the furnishing of materials relates to the date of beginning to furnish them, and includes all the materials thereafter furnished for the building; and such lien has priority over a mortgage executed after the date of the commencement to furnish the materials.

Section 315.—PARTNERSHIP CLAIM.—A partnership cannot claim a building lien for the materials furnished under contract with an individual member of the firm, nor can such member indirectly claim a lien as a member of the firm.

Section 316.—WHEN CONTRACTOR NOT ENTITLED TO LIEN.—A contractor who has entered into a written contract with the owner of land for the construction of a building for an amount in excess of one thousand dollars, but who fails to have the contract recorded, is not entitled to a lien for the value of the work done. He can only recover a personal judgment against the owner of the building for the value of his work and labor, without any allowance for counsel fees or expenses of preparing and recording a mechanic's lien.

Section 317.—DEDUCTION BY OWNER OF AMOUNT OF FORECLOSED LIEN.—It is the duty of the contractor to protect the property of the owner

against any lien preferred by sub-contractors, laborers, or material-men employed by him; and the owner is entitled to deduct from any amount due to the contractor the amount of the judgment and costs recovered upon foreclosure of the lien of a sub-contractor.

Section 318.—LIEN FOR MOVING A HOUSE.—Under Section 1183 of the Code of Civil Procedure, a contractor performing labor upon a house, by moving it from one place to another, is entitled to a lien thereon.

Section 319.—LIEN ON HOMESTEAD.—A mechanic's lien may be created on a homestead without the joint action of husband and wife. A homestead is free from forced sale, except as provided by the statute. Among the cases in which a homestead may be sold under execution, precisely as though it was not a homestead, are those under judgments obtained upon debts secured by the liens of "mechanics, contractors, artisans, architects, builders, laborers of every class, and material-men."

Section 320.—NOTICE BY MATERIAL-MAN TO TRUSTEES OF STATE INSTITUTION.—A notice given to Trustees of a State institution by one who had furnished material to a contractor with such Trustees for the erection of a building, that an amount is still due him for such material, and requiring the Trustees to pay him any amount then due or that shall thereafter become due to the contractor, operates as a garnishment and intercepts any payments which the contractor may then or thereafter be entitled to receive.

Section 321.—LIEN AGAINST RAILROAD.—A lien may be filed against a railroad, and where a railroad lies in two counties, it is not necessary to file the lien in both counties. It is sufficient if the lien is filed in one of the counties only through which the railroad runs.

Section 322.—ABANDONMENT AND NEW CONTRACT.—Where a building contract is abandoned, it is immaterial whether the building is subsequently completed by the owner or not; and a subsequent contract by the owner for the completion of the work is as disconnected with the original contract as if it were for the construction of a different building. Where the original contractor under a building contract gives to the owner of the building written notice that he abandons the contract, and that he declines to proceed further in its execution, and thereafter does no work on the building, whereupon the owner contracts with another builder to complete the construction of the building, it is incumbent upon those who claim any mechanic's liens by virtue of the original contract to file their claims of lien with the County Recorder within thirty days after there has been a cessation from labor for thirty days upon the unfinished contract.

Section 323.—TIME OF FILING CLAIMS OF SUB-CONTRACTORS.—The right to a mechanic's lien is purely statutory; and if claims of liens by sub-contractors are not filed within thirty days after the occupation or use of the building by the owner or his representatives, or the acceptance by the owner or his agent, they are not filed in time, notwithstanding the original contract provides for certificates of the architect, as a condition precedent to the contractor's right to demand payment.

Section 324.—LIENS ON MINING CLAIMS.—One who performs labor on a mining shaft, tunnel, level, chute, stope, uprise, crosscut, or incline, is entitled to a mechanic's lien on the mine for such services. The true meaning of such expressions as shafts, tunnels, levels, chutes, stopes, uprises, crosscut, inclines, etc., when applied to mines, signifies instrumentalities by which such mines are opened, developed, prospected, improved, and worked. He who engages in the construction of those prime requisites upon

or in a mine is engaged in mining, equally with one who extracts the gravel or ore from the mine.

Section 325.—MINER'S LIEN MUST BE UPON THE WHOLE CLAIM.—A mechanic's lien cannot be claimed upon part of a structure, or upon a structure which is part of a larger structure, or upon part of an entire property. Therefore, it has been held by the Supreme Court of California that a claim of lien for materials furnished for the construction of a mill, tramway, boarding-house, or reduction works upon a mining claim should be against the mining claim, and not against the specific structure upon the mine. One contributing labor or materials to a structure which is an appurtenance to a mine, or which, when constructed, is to form part of it, must be held to have anticipated its future use, and cannot claim a lien upon the structure alone. And the procedures provided for acquiring liens upon structures are not, in all respects, applicable to those claiming liens upon mining claims. They cannot all date back to the commencement of the work. On a mine the work is always going on, may have commenced before the laborers were born, and may continue indefinitely. There is no special thirty days, therefore, within which mining lienors must record their notices and claims of lien. The labor cannot generally be said to have contributed to the creation of the property, or added to its value; on the contrary, it may diminish its value—perhaps render it valueless. The Code does not seem to have provided for all the cases which may arise in regard to liens upon mining claims. We can only follow the procedure so far as applicable. For that purpose, the mining claim must stand in the place of the "structure" as the property to be charged with the lien. It is the property which should be described in the notice and claim of lien under Section 1187 of the Code. One who has built a chimney in a house, or a porch, or a door-step, has helped to build a structure; but he cannot acquire a lien upon

these specific structures, and by detached sales destroy the value of the claims depending upon liens upon the whole house. A structure may be a part of another larger structure, and in reference to it constitute but a part of a structure. In such cases it is well settled the lien must cover the entire structure. The mining lien, if it exists at all, extends to the whole claim. Strictly speaking, of course, a mining claim cannot be constructed, altered, or repaired. The intention of the lawmakers seems to have been to give a lien upon the whole claim, for labor performed on and for materials furnished for and used in any structure, on or in the mining claim. The lien given by the statute is upon the mining claim as a whole, and not upon the separate pieces of work done in its repairs. A claim of lien for material furnished, to be used in a building upon a mining claim, should be against the mining claim, and not against the specific structure upon the mine.

Section 326.—NO LIEN AGAINST A PUBLIC BUILDING.—A mechanic's lien cannot be acquired against a public building. A material-man or a mechanic who furnishes materials to or does work for a contractor for the erection of a county building, upon giving written notice to the county of his claim, as provided by Section 1184 of the Code of Civil Procedure, acquires, as against the contractor, a prior right of payment of his claim from the unpaid portion of the contract price. This right, as against the contractor, does not depend upon the legality of the building contract, or upon the right to acquire a lien. The material-man or mechanic may maintain an action to subject the unpaid portion of the contract price to the payment of his claim, without seeking to enforce a lien against the building. And in such action, the material-man or mechanic may obtain a judgment for any deficiency there may be, against the person to whom the materials were furnished, or for whom the work was done. In such an action, the material-man or mechanic is not entitled

to recover an attorney's fee, nor expenses incurred by him in giving notice of his claim.

Section 327.—RIGHT OF MATERIAL-MAN TO GIVE NOTICE.—A material-man may give notice to the reputed owner of the structure of his claim for material furnished at any time before money falls due under the contract, and no assignment made by the contractor of an amount to become afterwards due to him in the course of performance of the contract can, before the arrival of the time of payment, defeat the right of the material-man to give the notice provided for in the statute and to obtain the benefit of it; and the notice may be effectually given so long as the money is owed to the contractor himself, although the time when it should have been paid is passed.

Section 328.—ELEVATOR PART OF BUILDING.—Where the original plans for a large building provided for an elevator, and the contract for the construction of the elevator was let when contracts for other work were let, the elevator was a substantial part of the building, and the building was not completed, so that the limitations for filing mechanics' liens would run, until it was finished. An elevator was called for by the original plans and specifications. A contract was let for its construction at the same time that other contracts were let. It was attached to the building, and formed an integral part of it. The fact that the building might have been used without it, and that it was a convenience merely, is immaterial. Conceding an elevator to be a mere convenience—still conveniences are a material part of the building, when provided for by the plans and specifications; and, so provided for, the building is not completed until the demands of the plans and specifications in this regard have been satisfied.

Section 329.—DESCRIPTION OF MINING CLAIM.—The fact that a particular description by metes and bounds

of a mining claim in a notice of a lien is incorrect will render the notice invalid. Where the same persons own two mining claims in the same mining district, only one of which has on it improvements, and it appears that the mines are known by the names of the parties working them, a notice of lien reciting that it is for work done within a designated period of three months on a mining claim, with improvements, located in a particular mining district of a certain county, owned by the persons (naming them) who had the work done, does not identify the claim with the improvements with sufficient certainty to create a lien.

Section 330.—DWELLING-HOUSE—LAND SUBJECT TO LIEN.—Only so much of the land around a dwelling-house is subject to lien as may be necessary for the convenient use and occupation of the house. So, where a house was situated on a forty-acre tract, the Supreme Court has said that the whole tract was not subject to the lien. The statute does not contemplate anything of that kind. It means exactly what it says—a sufficient space around the dwelling for its convenient use and occupation. It does not contemplate that sufficient land around the dwelling-house to support the owner while living there be set apart. Neither the productiveness nor non-productiveness of the soil, nor the profit derived from the cultivation of the land, is a material element to be considered in determining the amount of land to be set apart with the dwelling-house. The statute simply allows the dwelling-house and a quantity of land around it sufficient for its convenient use, as the subject of a lien.

Section 331.—CONTRACTOR AND OWNER CANNOT TAKE AWAY MATERIAL-MAN'S LIEN.—The contractor and owner cannot deprive the material-man of his lien, by a clause in the contract, by which the contractor agrees to indemnify the owner against any liens taken by persons furnishing materials to be used in constructing the

building. If the material-man sues the owner, and obtains judgment against him, and against the property, the owner may deduct the amount of the judgment from any sum due the contractor on the contract price.

A material-man who has furnished materials to the original contractor of a building, to be used by him in its construction, is only entitled to be paid by the owner of the building when there is something owing and unpaid from the owner to the original contractor. (Decided by the California District Court of Appeals, in the case of McCue vs. Jackman, which decision is printed in California Appellate Decisions, Volume 6, No. 285, page 437.)

Section 332.—WHAT IS MEANT BY "OWNER."—When the law requires the claim of lien filed in the Recorder's office to state "the name of the owner or reputed owner, if known," it means the name of the person who is the owner at the time the claim is filed. The law does not refer to the owner with whom the contract for the improvement was made, or to the owner at any other time than at the date of filing the claim. The object of requiring the claim to be filed in order to perfect the lien is to give notice of the lien to those interested in the property upon which it is claimed; and, as the owner at the time of filing the claim is the party to be affected by it, rather than one who has parted with the property subsequent to the making of the original contract, it is reasonable to suppose that the Legislature intended the name of the owner at the time the claim is filed, rather than that of any previous owner.

Section 333.—REAL OR REPUTED OWNER.—It was not the intention of the Legislature that in the claim of lien filed for record the claimant must state the name of the real owner, at the risk of losing his lien if it shall turn out that he was in error. The provision of the law that

the claimant shall give the "name of the owner, or reputed owner, if known," implies that, if he does not know the name of the owner, he may state this fact, and perfect his lien without naming an owner; and also that, if in good faith he gives the name of a reputed owner, he will not lose his lien if it afterwards appears that some other person was the owner.

Section 334.—(In former editions Section 334 applied to the allowance of attorney's fees, as did also Section 313; but as the Supreme Court has declared the law allowing attorney's fees unconstitutional and void, Section 334 is omitted from the Eighth Edition.)

Section 335.—DUTY OF OWNER UPON RECEIVING NOTICE OF MATERIAL-MAN'S CLAIM.—Whether a building contract is recorded or not, if proper notice is given to the owner by a material-man of materials furnished by him to the contractor, it is the duty of the owner to withhold from the contractor sufficient money to pay the claim, if it is then due or afterwards becomes due.

Section 336. — PRIORITY OF MATERIAL-MAN'S CLAIM OVER MORTGAGE.—The lien of a material-man for lumber furnished for a dwelling will take precedence of a mortgage on the land executed immediately upon a conveyance thereof, but after the time when the materials were commenced to be furnished, notwithstanding the mortgage was given for the purchase price of the land.

Section 337. — MINING GROUND — PATENTED LAND.—A lien for work and labor may be taken upon mining ground owned by a patentee of the United States. The words "mining claim" in the statute include "mining ground" and all "mines," whether the title is perfect or not. But the lien will not extend to adjacent land which is not mineral in its character. The words "mining claim,"

as used in the law, have no reference to the different stages in the acquisition of the Government title. It includes all mines where no patent has been issued, as in the case of a mining claim in its strict sense, and also where the patent has issued.

Section 338.—APPOINTMENT OF PAINTER AS KEEPER.—The appointment by the owner of a building of a painter as keeper, and the fact that he lives in it while painting it, after the contractor has abandoned the work, does not constitute an "occupation" or "acceptance" of the building by the owner within the meaning of the law.

Section 339.—MATERIALS MUST BE EXPRESSLY FURNISHED FOR STRUCTURE CHARGED WITH LIEN.—In order to enforce the lien of a material-man against a building or structure, the materials must not only have been used in the construction of the building, but they must have been, by the express terms of the contract, furnished for the particular building on which the lien is claimed.

Section 340.—ASSIGNMENT OF MECHANIC'S LIEN.—A mechanic's lien can be assigned, after the claim of lien has been filed for record, but not before. Before the claim of lien has been filed for record, the right to the lien is a mere personal privilege, which the laborer, mechanic, or material-man may exercise or not, as he sees fit; hence it is not the subject of assignment. But after the claim of lien has been filed for record, it can be assigned, and the assignee will have all the rights of the original holder of the lien.

Section 340a.—IF BUILDING IS DESTROYED BY FIRE, NO LIEN CAN AFTERWARDS BE FILED.—Where a building in course of construction is destroyed by fire, without any fault of the owner, before any mechanic's

lien has been filed thereon, the party who furnished materials for the building, or who performed labor upon it, can have no lien upon the land upon which the building was being constructed. The benefit conferred upon the owner, by placing the labor and materials in his building, is the true consideration in law for conferring the right of lien upon the parties furnishing such labor and materials. It cannot be said that this consideration exists, where the building is destroyed before completion and before delivery to the owner. In such case, the owner has not derived and can never derive any benefit from the labor and materials furnished. (Decided by the Supreme Court of California in the case of Humboldt Lumber Mill Company vs. Edward Crisp, which decision is printed in Volume 29, California Decisions, page 629.)

Section 340b.—LIEN FOR POWER SUPPLIED.—All persons supplying power by means of teams, wagons, vehicles, implements, or appliances, used either immediately in or upon the construction, alteration, addition to, or repair, either in whole or in part, of any of the improvements or works, mentioned in Section 285, or used in the immediate transportation of the materials furnished for any of said purposes and actually used therefor, have a lien for such power supplied, of the same character and effect, and to be enforced in the same way as that granted to persons furnishing materials. The liens provided for by this section rank second to liens for performing manual labor (or shall be of the same rank and entitled to be treated as the equivalent of liens for materials furnished), and the rank of such liens must be so declared by the court.

Act of the Legislature, approved April 19, 1909.

Section 340c.—LIEN FOR WORK DONE BY ORDER OF HEALTH OFFICER.—A law passed in 1909 provides as follows:

"Any health officer or governing board of any city, town or sanitary district, having served written notice upon the owner or reputed owner of real estate upon which there is a dwelling house, and such owner or reputed owner, after thirty days, having refused, neglected or failed to connect such dwelling house, together with all toilets, sinks, and other plumbing therein, properly vented, and in a sanitary manner, with the adjoining street sewer, may construct the same at a reasonable cost, and the person doing said work at the request of such health officer or governing board has a lien upon said real estate for his work done and materials furnished."

Act of the Legislature, approved April 19, 1909.

Architects

Section 341.—COMPENSATION OF ARCHITECT.—The compensation of an architect who draws plans and specifications is left to an agreement between himself and his employer. But if there is no agreement as to what is to be paid for the architect's work, the law will allow him a reasonable compensation for his services. What is a reasonable compensation will depend upon the character of the work he has done, and will be determined by the knowledge and experience of persons skilled in that kind of work. Custom may also enter into the question of the architect's compensation, as where he has superintended the construction of the building, and it is the local custom to pay architects so much for such service; in which case it will be presumed that his services of like character were worth the customary compensation, unless some fact is shown which makes these services worth more or less than the customary rate.

Section 342.—ARCHITECT'S LIEN.—An architect has a lien on the building for his pay, provided he superintends the erection of the building. He must, to enforce his lien, file the same claim of lien in the office of the County

Recorder as is required of laborers, mechanics, and material-men, referred to in preceding Sections.

Code of Civil Procedure, Section 1183.

Section 343.—ARCHITECT CANNOT FILE LIEN AGAINST PUBLIC BUILDING.—If an architect prepares plans and specifications for a public building, such as a Court House, Jail, City Hall, Hall of Records, or School House, he cannot file a lien against any such property, and he must look only to the public funds provided by law for such public improvements. Justice Temple, in the Supreme Court of California, in the case of Mayrhofer against the Board of Education of San Diego, in which case it was decided that in California no lien will be allowed against a public building, stated the reason thus: "The claim is made that public buildings are included both in the word 'property,' used in the Constitution, and in the phrase 'any building,' used in the Code, and therefore it must necessarily follow that mechanics and material-men are, by these provisions, given a right to a lien upon such buildings. But this ignores the rule of statutory construction, that the State is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. The Government was created and shaped by the Constitution. It is not an end in itself, but a mere instrumentality for public services. Its powers and functions exist only for the people. One of its functions is to enact laws for the government of the inhabitants within its limits, thereby affording them protection and advancing their general welfare. The property it holds is simply to enable it to perform the services required of it. It is as much devoted to public use as are the streets and highways, though in a different way. Instead of being the natural and obvious conclusion, that a general law providing remedies for private individuals was intended to enable a creditor of the State to seize this

property for the satisfaction of his debt, it would be a most unnatural inference. The Constitution has itself provided, as the only means which the State has for the payment of its debts, the exercise of the sovereign power of taxation. And for each political subdivision the rule is the same. These revenues are divided into specific funds, and one furnishing labor or material to the State knows to what he must look for payment. He becomes a creditor of a specific fund, and has no rights except with reference to such fund." (Decided by the Supreme Court of California in the case of Mayrhofer vs. Board of Education of San Diego, which decision is printed in Volume 89 of the California Reports, page 110.)

Section 344.—ARCHITECT HAS NO LIEN AGAINST MONUMENT IN PUBLIC PARK.—Where an architect is employed by a contractor for the erection of a monument in a public park, he has no lien for his pay upon the monument or the land on which it is erected. This question was decided by our Supreme Court in the matter of the Garfield Monument, in Golden Gate Park, San Francisco. The Supreme Court said: "The monument, though built by private contribution, was erected upon and as an adornment of one of the public parks of the municipality. It was affixed to the freehold, and thus became a part of the land, the property of the municipality. The monument could not be made subject to a lien." (Decided by the Supreme Court of California in the case of Griffith vs. Happersberger, which decision is printed in Volume 86 of the California Reports, page 605.)

Section 345.—PAYMENTS MADE ON ARCHITECT'S CERTIFICATE.—Where the contract provides that payments shall be made on the certificate of the architect—who is required by the contract, among other things, to certify that all the work of the mechanics, laborers, and others employed by the original contractor, has been paid—

his certificate is conclusive of the rights of all parties concerned, unless it can be shown that it was obtained by the owner by collusion or fraud.

Section 346.—ARCHITECT'S CERTIFICATE AS TO LIENS.—Where a building contract provides that for each of the payments a certificate shall be obtained from the architect, and that at the time of the presentation of any certificate there shall not be any liens against the building, and a lien is filed before the last installment, it does not become due while such condition exists; and the amount of the lien must be deducted from the amount due the contractor.

Section 347.—CONDITION AS TO CERTIFICATE MAY BE WAIVED BY OWNER.—The condition in a contract for the erection of a building, that all installments of payments shall be made upon certificates of the architect that the materials and labor have been furnished in accordance with the plans and specifications, may be waived by the owner. The clause as to the production of the certificates is for the benefit of the owner, and he may waive it at his option, and accept other proofs.

Section 348.—ARCHITECT'S PLANS PART OF CONTRACT.—When the contract mentions the architect's drawings and specifications, and refers to them for conditions of the agreement, they form an essential part of the building contract, and should be annexed to the contract before filing. The plans and specifications cannot be left in the architect's office, and at the same time be considered as annexed to the contract. If intended to co-operate with and be incorporated into the formal contract, the drawings and specifications must be in fact attached to the contract and filed for record at the same time.

Section 349.—CONTRACT VOID FOR FAILURE TO RECORD SPECIFICATIONS.—Where a building

contract is not filed in the Recorder's office, but a memorandum is filed which contains within itself no sufficient statement of the general character of the work to be done, but refers to plans, drawings, and specifications remaining in the office of the architect and which are not recorded, the contract is void, and mechanic lienors are entitled to recover the full value of the labor done and materials furnished, irrespective of the contract price.

Section 350.—SERVICES OF ARCHITECT.—The services of an architect, in the preparation of drawings, plans, and specifications for a building and in superintending its erection are "work and labor upon a building," within the meaning of the mechanic's lien law. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the wall, and labor of a most important character. The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs, and applies the labor of others. The general principle upon which the lien laws proceed is, that any person who has contributed by his labor or by furnishing materials, to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation. An architect who prepares the drawings, plans, and specifications for a building, and superintends its erection, may as truly be said to perform labor on it as any one who takes part in the work of construction.

Section 351—LIABILITY OF ARCHITECT FOR NEGLIGENCE.—An architect must perform his services with diligence and ordinary care. If by his negligence long delay occurs in finishing drawings, plans, and specifications which he has agreed to furnish, and the other party is damaged by the delay, he is liable for the loss. Or if, as superintendent he neglects his duty, to the detriment of his employer, he is also liable to him in damages.

The architect is bound to devote to his employer the skill and energy he possesses, and will be liable in damages for any failure in this respect.

Section 352.—CONTRACT FOR PERCENTAGE ON COST OF BUILDING.—Under a contract with an architect to furnish the necessary drawings, specifications, and details for the construction of a building, for a certain percentage of the total cost of the construction of the building, the architect, after furnishing the drawings, etc., in case his employment is terminated before the completion of the building, is entitled to the agreed commission on the total cost of the building. This was determined by our Supreme Court, in a case where Charles I. Havens sued Annie Donahue, at San Francisco, for a commission of two and a half per cent upon the total cost of the building, according to his contract with Mrs. Donahue. He was paid a portion of the commission, but his employment was terminated before the building was completed, and he sued to recover the balance. Mrs. Donahue contended that Havens was only entitled to recover his commission upon the cost of construction so far as the building had proceeded at the time his employment was terminated. The Supreme Court decided that the architect in question had nothing to do with the construction of the building. His contract was simply to furnish the plans, drawings, and specifications, and this he did. (Decided by the Supreme Court of California in the case of Havens vs. Donahue, which decision is printed in Volume 111 of the California Reports, page 297.)

Section 353.—LIABILITY FOR DISCLOSING INTENTION OF OWNER.—An architect employed to furnish plans for the erection of a building on a site on which there is another building, occupied by tenants, is not liable to the owner, by telling people of the intended erection of the new building—the architect having neither contracted

nor been requested to keep such a fact secret—for the loss of rent caused by the vacation of the building by the tenants.

Section 354.—TIME SPENT ON PLANS AND SPECIFICATIONS.—Where an architect is compelled to sue for his compensation, and there is no agreement fixing the amount of his pay, he may prove the reasonable value of his services. And evidence as to the length of time spent by an architect on certain plans and specifications is admissible on the question of the value of his services in preparing them, the jury not being limited to a consideration of the expert testimony on that question.

Liens for Salary and Wages

Section 355.—PREFERRED CLAIMS FOR SALARY AND WAGES.—The law of California provides for certain liens for salary and wages, which do not come in the class of mechanic's liens, because including other persons in other occupations. In all assignments for the benefit of creditors, or in proceedings for insolvency, the wages and salaries of miners, mechanics, salesmen, servants, clerks, or laborers, are preferred claims. It must appear that the services were rendered or work done within the previous sixty days. These claims will be preferred to the amount of one hundred dollars each, and must be paid before any other creditors of the person who makes the assignment.

Code of Civil Procedure, Section 1204.

Section 356.—PREFERRED CLAIMS FOR WAGES AND SALARIES AGAINST ESTATES.—In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, or laborer, who has rendered services or performed work within the sixty days next preceding the death of the employer, not exceeding one hundred dollars in amount, are preferred claims against the estate, and must be paid by the executor or administrator

of the estate before any other claims, except the funeral expenses, expenses of the last sickness, expenses of administration, and family allowance.

Code of Civil Procedure, Section 1205.

Section 357.—WAGES AND SALARIES IN CASE OF ATTACHMENT AND EXECUTION.—In cases of attachments and executions (not issued in suits for wages) served on the employer of any miners, mechanics, salesmen, servants, clerks, or laborers, the latter may give notice to the creditor and the officer levying the attachment or execution of their claims for wages or salaries; the notice may be given at any time before the actual sale of the property levied on, or, in the event of a levy upon money, at any time before the transfer of such money under execution. After the notice is given, unless the claim is disputed, by the debtor or a creditor, the person presenting to the person claiming wages or salary the amount he is entitled to receive for services rendered within the sixty days next preceding the levy of the attachment or execution, not exceeding one hundred dollars, the officer must make this payment out of the proceeds of sales of property, or out of money coming into his hands by the levy. The claim for wages or salary referred to must be sworn to by the person making the claim. If the claim as made is disputed, by the debtor or a creditor, the person presenting the claim must commence a suit on it within ten days; the officer in the meantime holding enough money to pay the claim until the determination of the suit.

Code of Civil Procedure, Section 1206.

Vendor's Lien

Section 358.—LIEN OF SELLER OF REAL PROPERTY.—One who sells real property has a vendor's lien, independent of possession, for so much of the price as remains unpaid and unsecured. The vendor may have the

personal obligation of the buyer, but this is not a security which will defeat his vendor's lien.

Civil Code, Section 3046.

Section 359.—WHEN TRANSFER OF CONTRACT WAIVES VENDOR'S LIEN.—The seller of real estate may waive his vendor's lien for the purchase price. And where the buyer has given to the seller a written contract for payment of all or part of the price, and the seller assigns and transfers the contract to a third person, this will be considered a waiver of his vendor's lien to the extent of the sum payable under the contract. But a transfer of the contract, in trust to pay debts, and the surplus to belong to the seller, is not a waiver of the lien.

Civil Code, Section 3047.

Section 360.—EXTENT OF VENDOR'S LIEN.—A vendor's lien is valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value. If the buyer transfers the property to one who has no notice of the lien of the vendor, no notice or knowledge that any part of the price remains unpaid, and who pays a valuable consideration for the property, and acts throughout the transaction in good faith, the vendor will lose his lien. So, as to a mortgagee, where the vendee has given a mortgage on the property to one who has no notice of the real facts, and takes the mortgage in good faith and for value, the vendor cannot assert his lien against the mortgagee.

Civil Code, Section 3048.

Section 361.—LIEN OF SELLER OF PERSONAL PROPERTY.—One who sells personal property has a special lien, dependent on possession, for its price, if the property is in his possession when the price becomes payable. The lien may be enforced in the same manner as when property is pledged. That is to say, he may store the

property, and sue the vendee for the price; or he may resell the property, to the best advantage, and recover from the vendee the difference between the contract price and the price obtained on the resale.

Civil Code, Section 3049.

Liens on Personal Property

Section 362.—LIEN FOR SERVICES.—Every person who renders any service to the owner of personal property, in labor or skill, employed for the protection, improvement, safe-keeping, or transportation of the property, has a lien upon it, dependent on possession, for the compensation due to him from the owner for such services.

Statutes of 1901, page 270.

Section 363.—LIEN OF LIVERY STABLE PROPRIETORS.—Livery or boarding or feed stable proprietors have a lien, dependent on possession, for their compensation for caring for, boarding, and feeding horses and stock. In order for the lien to attach, however, it is necessary that the animal be placed with the livery stable proprietor by its owner, or by some one having authority from him. Therefore, if a thief places a stolen horse in a livery stable, or if the horse is placed there by anybody not having authority from the owner, the keeper of the stable has no lien on the horse. A lien can generally be created only by the owner of property, or by his agent. Hence, one having possession of a horse under an agreement to purchase, by which agreement the seller retains the title until payment is made, cannot, as against the seller, create a lien for its board and care. But where the owner or his agent leaves a horse, buggy, and harness in a livery stable, the livery stable keeper has a lien on all the property—the horse, buggy, and harness—on account of his feed and care of the property. He should give notice to the owner of the amount of his charges, and that if not paid he will sell

the property. If, after giving the notice, the charges are not paid, the livery stable keeper can sell the property and retain enough to pay his charges and the costs of sale. If any amount remains, after paying his charges and the costs of sale, the owner of the property is entitled to the balance. The law does not specify any particular form of notice to the owner, nor any particular time of notice; the notice given should be reasonable in time, so as to give the owner a fair opportunity to come and pay the charges and release his property from the lien.

Statutes of 1901, page 270.

Section 363a.—DEFRAUDING LIVERY STABLE KEEPERS.—There is a law, making it a misdemeanor to defraud a livery stable keeper, the punishment for which may be a $500 fine, or imprisonment in the County Jail for six months. Any person who obtains any livery hire or feed, without paying for it, with intent to defraud; or who obtains credit by the use of any false pretense; or who abuses a horse, or keeps it longer or drives it further than agreed upon; or who allows a feed bill to accumulate against his property, is guilty of a misdemeanor. But in all such cases the intent to defraud must be proved as a fact.

Statutes of 1903, page 157.

Section 364.—LIEN FOR PASTURING HORSES OR STOCK.—A farmer or ranchman has a lien for pasturing horses or stock, dependent on possession, for the amount of his compensation. If the pasturage is not paid when due, notice should be given to the owner of the stock that the pasturage charges, stating the amount, must be paid at a certain time, or the stock will be sold. The notice must be for a reasonable time, according to circumstances, and if the pasturage charges are not then paid, the stock can be sold to pay the bill.

Statutes of 1901, page 270.

Section 365.—LIEN OF LAUNDRY PROPRIETORS.—Laundry proprietors and persons conducting a laundry business have a general lien, dependent on possession, upon all personal property in their hands belonging to a customer, for the balance due them for laundry work.

Statutes of 1901, page 270.

Section 366.—LIEN FOR REPAIRING PERSONAL PROPERTY.—A person who makes, alters, or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the property for his reasonable charges for work done and materials furnished; and he may keep possession of the property until his charges are paid. If the charges are not paid within two months after the work is done, the property may be sold at public auction, by giving ten days' public notice of the sale in some newspaper published in the county in which the work was done. If there is no newspaper published in the county, the notice must be posted up in three of the most public places in the town where the work was done, for ten days previous to the sale. The proceeds of the sale must be applied to the payment of the lien and expenses of selling the property, and if there is any balance left, it must be paid over to the owner of the property.

Civil Code, Section 3052.

The right of a person performing labor on personal property to a lien thereon exists only in favor of the person who does the work directly under the contract with the owner, or some one authorized to act for him.

Where an owner of tan bark contracts with a person to cut and deliver the same, and the latter employs persons to do the work, such persons have no lien upon the bark for their services. Possession of tan bark by employees of a contractor, who are engaged in cutting the same, is simply that of employees, and not that exclusive and unconditional possession which is necessary in order to constitute a basis

of lien. (Decided by the Supreme Court of California, in the case of Quist vs. Hill, which decision is printed in Volume 37, California Decisions, page 41.)

Section 366a.—SALE OF PROPERTY.—The sale of property for any of the liens specified in Sections 362, 363, 363a, 364, 365, and 366, is provided for definitely by a law passed in 1907. The law provides that if a person entitled to the lien is not paid the amount due him within twenty days after it becomes due, then he may proceed to sell the property, or so much thereof as may be necessary to satisfy his lien and costs of sale, at public auction. Ten days' previous notice of sale must be given by advertising in a newspaper. The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property; and the remainder if any must be paid over to the owner of the property. This law applies to all cases mentioned in Sections 362 to 366, inclusive.

Act of the Legislature, in effect May 1, 1907.

Section 367.—OFFICER'S LIEN.—An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the writ is discharged or satisfied, or until a judicial sale of the property is had.

Civil Code, Section 3057.

Logger's Lien

Section 368.—LIEN FOR LABOR ON LOGS AND LUMBER.—All persons who labor at cutting, hauling, rafting, or drawing logs, or lumber, or who perform any labor in or about a logging-camp necessary for the getting out or transportation of logs or lumber, have a lien on the property for the amount due for their personal services. This lien takes precedence of all other claims, and continues for thirty days after the logs or lumber arrive at the place of destination, for sale or manufacture. If logs

are rafted down a river, to a sawmill for manufacture; or if logs are hauled on a railroad, to the mill; in either case the lien of the logger continues for thirty days after the logs reach the mill.

Section 369.—CLAIM OF LIEN TO BE FILED FOR RECORD.—Within twenty days after the completion of his work, if a logger or laborer in the woods or camps desires to take advantage of the lien law, he must file for record in the office of the Recorder of the county a claim, sworn to by him, containing a statement of his demand, after deducting all just credits and offsets; the time within which the labor was done; the name of the person or persons for whom he worked; the place where the logs or timber upon which the lien is claimed are believed to be situated, and how they are marked; the name of the reputed owner; and the name of the reputed owner of the land from which the logs were cut and hauled.

Section 370.—WHEN SUIT MUST BE COMMENCED TO FORECLOSE LIEN.—After the claim of lien has been filed, a suit to foreclose the lien must be commenced within twenty-five days; and if this is not done, the lien will be at an end.

Section 371. — ATTACHMENT AS FURTHER SECURITY.—The law provides, that when the suit to foreclose the lien has been commenced, the logger may have the logs or timber attached as further security for the payment of any judgment he may recover in the suit. The writ of attachment is issued by the Clerk when he issues the summons, or it may be issued at any time afterwards, upon receiving an affidavit from the plaintiff showing the defendant's indebtedness to him, and that the attachment is asked for in good faith. The Sheriff will levy the attachment by taking the logs or timber into his possession, and will be bound to keep possession of the property unless the defendant gives him security to pay the judgment, if

any is obtained against him in the suit. If the defendant gives the security, the Sheriff will release the property, free from the lien; for if the logger obtains good security that his claim will be paid, if he gets a judgment, this is all he needs, and the lien will no longer be necessary.

Section 372.—UNDERTAKING ON ATTACHMENT.—Before the attachment will issue, a bond will have to be filed with the Clerk, in a sum not less than two hundred dollars, for costs and damages if the defendant wins the suit.

Section 373.—EXTENT OF THE LIEN.—The logger's lien in no case extends beyond the limits of the county in which the logs or timber in controversy were cut.

Section 374.—ATTACHMENT NOT NECESSARY TO HOLD LIEN.—The attachment of the logs and timber is not necessary to hold the lien. It is at the option of the logger whether any attachment at all shall be issued, and it is only provided as additional security, and for the purpose of compelling the defendant to give a bond for the amount of the claim. The logger may file his claim of lien, and then proceed and foreclose it, without getting out any attachment at all.

Statutes of 1877, page 747; Statutes of 1880, page 38; Statutes of 1887, page 53.

Liens of Persons Working on Threshing Machines

Section 375.—PERSONS ENTITLED TO THE LIEN.—Every person performing work or labor with or about any threshing-machine or engine, horse-power, wagon, or other of the appliances, while engaged in threshing, has a lien on the property to the extent of the value of his services.

Section 376.—EXTENT OF LIEN.—This lien extends for ten days after the claimant has ceased such work or labor.

Section 377.—**SUIT MUST BE COMMENCED WITHIN TEN DAYS.**—The lien expires unless a suit to recover the amount of the claim is commenced within ten days after the party ceases work.

Section 378.—**PROCEEDS OF SALE DISTRIBUTED PRO RATA.**—In any suit to enforce a lien on a threshing-machine outfit, when a judgment is obtained in favor of the plaintiff, and the property is sold, the proceeds of the sale are required by the law to be distributed pro rata to all judgment creditors who have, within ten days, begun suits to recover judgments for the amount due them for such work. The meaning of this is, that where there are a number of laborers who have filed their suits, they shall all share alike in the final disposition of the property. If the property will sell for enough to pay all in full, they will each receive full pay; but if the proceeds of the sale are not sufficient to pay all in full, then each must lose in proportion to the amount of his claim.

Section 379.—**NO NOTICE REQUIRED.**—To enforce a lien upon a threshing-machine, no notice is required to be recorded, or given to anybody. The law creates the lien, without any formality, and the only thing required of the laborer is, that he shall commence suit within ten days after he quits work.

Section 380.—**LIEN IS ASSIGNABLE.**—The lien of laborers on or with a threshing-machine is assignable. All may assign to one person, before suit is brought, and the assignee may bring suit upon all the claims at the same time.

Statutes of 1885, page 109.

Liens in Favor of Owners of Stallions, Jacks and Bulls

Section 381.—**PERSONS ENTITLED TO THE LIEN.**—There had been so many complaints by owners of stallions, jacks, and bulls, kept for breeding purposes, of

inability to collect their charges for services rendered, that the Legislature was induced to pass a law giving them a lien upon the animals served. This law provides that any owner or person having in charge a stallion, jack, or bull, used for propagating purposes, shall have a lien for the agreed price for the service of such stallion, jack, or bull, upon any mare or cow served for pay and upon their offspring.

Section 382.—CLAIM TO BE FILED.—A claim must be filed in the office of the County Recorder, in the county where the mare or cow is served or kept, which must contain a particular description of the mare or cow served; the date and place of serving; the name of the owner or reputed owner of the mare or cow served; a proper description, by name or otherwise, of the stallion, or jack, or bull, performing the service, and the name of the owner or person in charge of it; and the amount of the lien claimed.

Section 383.—NOTICE TO SUBSEQUENT PURCHASERS.—The claim of lien, when filed, operates as notice to subsequent purchasers and encumbrancers of the mare or cow for the term of one year from the date of the filing of the claim.

Section 384.—FALSE REPRESENTATIONS INVALIDATE LIEN.—Any wilfully false representations concerning the breeding or pedigree of the stallion, jack, or bull, made or published by the owner or person in charge of it, will invalidate the lien.

Section 385.—SUITS TO FORECLOSE.—Suits to foreclose these liens may be brought in any county where the mare or cow, or the offspring from such service, may be found.

Section 386.—ATTACHMENT AS SECURITY.—Plaintiff may have an attachment put on the mare or cow, or their offspring, at the time of issuing the summons, or at any time afterwards before judgment, as further security

for his pay; an undertaking on attachment is required to be given, before the attachment will issue; and the Sheriff must then take into his possession the mare or cow, or offspring, and keep them pending the suit, unless the owner or person in charge of the animals gives him a bond to pay the judgment, if one should be obtained.

Statutes of 1891, page 90.

Damages for Breach of Contract

Section 387.—MEASURE OF DAMAGES.—The measure of damages allowed by the law of this State, for the breach of an obligation arising from contract, is the amount which will compensate the injured party for all the detriment proximately caused by the breach, or which in the ordinary course of things would be likely to result.

Civil Code, Section 3300.

Section 388.—BREACH OF CONTRACT TO PAY MONEY.—The detriment caused by the breach of an obligation to pay money only is the amount due by the terms of the obligation, with interest. The holder of a note may be greatly damaged by the failure of the other party to pay it; for he may have to borrow money himself at high rates of interest; or he may be unable to borrow, and thus incur ruinous loss which might have been avoided if his debtor had paid him. Yet the law considers that to allow any damages, further than the amount due on the contract, would be to fix a measure of damages too uncertain and unreliable to meet the requirements of daily business and commercial life; and, therefore, the law has placed the measure of damages for breach of a contract for the payment of money only at the amount due by the terms of the obligation, with interest.

Civil Code, Section 3302.

Section 389.—BREACH OF WARRANTY OF TITLE.—When one sells property and warrants the title, and the title proves bad, the law allows the grantee the price paid

to the grantor, if the title to the whole property is bad; or, if there proves to be no title to a part only of the property, such proportion of the price as that portion bears to the whole property; and, also, interest at seven per cent on the price paid for the time during which the grantee derived no benefit from the property, not exceeding five years.

Civil Code, Section 3304.

Section 390.—DAMAGES IN CASE OF EXCHANGE OF LANDS.—When lands are exchanged, and the title to one of the tracts fails, which in the exchange between the parties was conveyed with general warranty, a recovery may be had against the grantor of that tract for the value of the land, with interest and costs.

Section 391.—BREACH OF AGREEMENT TO CONVEY REAL PROPERTY.—The damages caused by the breach of an agreement to convey an estate in real property is the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest.

Civil Code, Section 3306.

Section 392.—BREACH OF AGREEMENT TO BUY REAL PROPERTY.—The damages caused by the breach of an agreement to buy an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract, over the value of the property to him.

Civil Code, Section 3307.

Section 393.—BREACH OF WARRANTY OF TITLE TO PERSONAL PROPERTY.—Where the title to personal property is warranted, and there proves to be no title, the damage is the value of the property to the buyer, when he is deprived of its possession, together with any

costs which he has become liable to pay in a suit brought by the true owner to recover the property.

Civil Code, Section 3312.

Section 394.—DAMAGES FOR BREACH OF WARRANTY OF QUALITY OF PERSONAL PROPERTY.—Where personal property sold is warranted to be of a certain quality, and turns out not to be of that quality at all, the buyer is entitled to damages for the difference in value between what he bargained for and that which was actually delivered to him.

Section 395.—BREACH OF WARRANTY FOR SPECIAL PURPOSE.—If personal property is sold for a special purpose, as a machine designed to do certain work, and is warranted fit for that purpose, and turns out to be unfit, the buyer is entitled to damages; and his damages will be the difference between the value of the thing as it is and its value as it would have been had it been as warranted. And if the buyer, before he discovers that the property is unfit for the purpose for which it was warranted, makes an effort in good faith to use it for that purpose, he will also be entitled to damages for his loss in trying to make use of it.

Civil Code, Section 3314.

Section 396.—DAMAGES FOR BREACH OF CARRIER'S OBLIGATIONS.—A carrier of freight, passengers, or messages, is bound to accept them when tendered to it. If it refuses, the person requiring the service, and who is thus compelled to look elsewhere to have it performed, is entitled to damages, being the difference between the rate which the first carrier had a right to charge and the rate which he was afterward compelled to pay. If a carrier of freight fails to deliver it, the law makes the carrier liable in damages, and fixes the measure of the damage at the value of the property at the place and on the

day at which it should have been delivered, deducting whatever the freight charges would have been. So, if freight is lost on the way, the carrier will be liable to pay such damages. The carrier and the consignor may, however, make a valid contract limiting the liability of the carrier. While the ordinary measure of damages for breach of a carrier's obligation to deliver freight is the value of the goods at the time and place of delivery, the liability of the carrier may be limited by a special contract signed by the consignor, making the invoice price at the point of shipment the measure of damages, or otherwise limiting the carrier's liability. A carrier of freight is also liable to pay damages for delay in delivering the freight. The damages allowed will be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation in the market value of the goods.

Civil Code, Sections 3315, 3316, 3317.

Section 397.—DAMAGES FOR BREACH OF OTHER CONTRACTS.—The damages allowed for the breach of any contract must be the proximate result of the breach. The damages must not be speculative and uncertain, and they must be capable of being traced to the act complained of. For the breach of any contract, the injured party is entitled to enough damages to make him whole again, provided the damages claimed are the proximate or natural results of the breach. The damages allowed must be such as are proximately caused by the breach, or such as in the ordinary course of things would be likely to result from it.

Partnership

Section 398.—WHAT CONSTITUTES A PARTNERSHIP.—The Civil Code of California defines a partnership as being "the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them." This definition of a partnership

is not as comprehensive as many that have been adopted by eminent writers on legal subjects. Judge Story defines a partnership thus: "Partnership, often called co-partnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits between them." But whether we consider the definition of Judge Story, or the definition to be found in the Civil Code of California, first quoted, it is very evident that in all one essential thing is omitted. They state that there is to be a division of the profits, but say nothing about sharing the losses. A better definition of partnership, and one more in accord with the established conditions of modern business, might be suggested thus: Partnership is the voluntary association of two or more persons for the purpose of carrying on business together, and dividing its profits and sharing its losses between them. For there may be, and often is, a sharing of the profits of a business venture, when there is no partnership. Agents, or brokers, or commission merchants may be offered and accept a share of the profits, as an inducement to greater effort on their part, but this will not constitute them partners with their principals. There must be a community of interest in both the profits and the losses, to constitute a valid partnership.

Section 399.—FORMATION OF PARTNERSHIP.—A partnership can be formed only by the consent of all the parties. As the voluntary consent of all the members is necessary in the formation of a partnership, it is the law that no new partner can be admitted into a partnership without the consent of every member. If one partner sells his interest in the partnership property, this will not make the purchaser a partner, without the consent of the partner who stays in the business. Neither member of a partnership can force a new member into the firm.

Section 400.—PARTNERSHIP PROPERTY.—The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired by the partnership. But while every partnership presupposes that there must be something brought into the common stock or fund by each member, it is not necessary that each should contribute or contract to contribute money, goods, effects, or other property, towards the common stock; for one may contribute labor, or skill, and another may contribute property, and another may contribute money, according as they shall agree. Sometimes it happens that each partner contributes only skill, or labor, or services, for the common benefit. But all must contribute something, and thus join together either money, or goods, or other property, or labor, or skill. Whether the partners in the first place contribute money, or real or personal property, or only their personal labor and services, if they afterwards acquire any property in the partnership business and with partnership funds, it belongs to the firm, and not to the members individually.

Civil Code, Section 2401.

Section 401.—PARTNER'S INTEREST IN PARTNERSHIP PROPERTY.—The interest of each member of a partnership extends to every portion of its property. One partner has no interest distinct from the other in the assets of the firm. One partner has no control of the partnership assets which the other cannot have. The property of the partnership is common, held by a community of interest; and it is always first liable for the partnership debts, before any of it can be applied to the individual use or individual debts of either partner.

Section 402.—POSSESSION OF PARTNERSHIP PROPERTY.—Partners are equally entitled to possession of the partnership property. Partners are joint owners

and possessors of all the capital stock, funds, and effects belonging to the partnership, as well as of those which belonged to it at the time of its first formation and establishment; so that, whether its stock, funds, or effects be the product of their labors or manufactures, or be received or acquired by sale, barter, or otherwise, in the course of their trade or business, there is an entire community of right and interest between them.

Neither partner has any right of possession of the partnership property to the exclusion of the other. One partner is as much entitled to the possession as the other. Nor would it make any difference if the partnership was dissolved; for in that case both partners would be entitled equally to the possession of the partnership assets, until the partnership affairs could be finally settled up.

Section 403.—PARTNER'S SHARE IN PROFITS AND LOSSES.—In the absence of any agreement on the subject, the shares of partners in the profits or losses of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss. Where there is no agreement between the partners, they are to contribute equally to every loss, whether the loss be unpaid advances, or the loss of the original capital brought in; and this is the rule, whether the partners contributed to the capital in equal shares or not. It is essential to the interest of a valid partnership that there should be a sharing of profits and a sharing of losses. Profits and losses will be shared equally, if there is no agreement to the contrary, no matter what proportion of the firm assets was originally contributed by each. But the partners may agree between themselves that one shall have a larger share of the profits than the other, or that one, if losses occur, shall bear a larger share of the loss than the other, and this agreement will be valid and binding. An agreement to divide the profits of a business implies an agreement for a corresponding

division of its losses, unless it is otherwise expressly stipulated. But the law recognizes the fact that the inequality of skill, of labor, or of experience, which the partners may bring into the particular business, may not only justify but positively require an inequality of compensation, and of exemption from loss, as a matter of justice and equity between the parties. And the law has, therefore, wisely not prohibited it; but has left it to the parties to exercise their own discretion in these matters, taking care that no fraud, imposition, or undue advantage is taken by one of the other. And wherever stipulations are fairly made between partners, for unequal sharing of profits and losses, the law will uphold and enforce them as valid agreements.

Civil Code, Sections 2403, 2404.

Section 404.--APPLICATION OF PARTNERSHIP PROPERTY TO PAYMENT OF DEBTS.—Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance, if any, due to him. The debts of a partnership must be paid out of the partnership property, before any portion of it can be applied to the individual debts of the partners. The interest of a partner may be levied upon for the payment of his debts, but when this is done, the creditors of the firm must be first satisfied, before the property can be taken to pay anybody else.

Section 405.—WHAT IS PARTNERSHIP PROPERTY. —All property, whether real or personal, acquired with partnership funds, is presumed to be partnership property. There is little difficulty in determining the partnership character of personal or movable property, as a stock of goods, for instance; but there is sometimes difficulty in determining the true character of real estate. The deed to real estate must necessarily be made to and be recorded

in the individual names of one or more members of the firm. Cases often occur where the partner in whose name real property stands of record denies that it is partnership property and claims it as his own. Whenever this occurs, it is important to know the law governing the matter. It is the general rule in law that real or immovable property is deemed to belong to the persons in whose name the deed stands. But, as to partners, however the recorded title may stand, or in whose name it may be, real estate bought with partnership funds for partnership purposes will always be considered partnership property.

Section 406.—MUTUAL OBLIGATIONS OF PARTNERS.—The relations of partners are necessarily confidential, and they are always bound to deal in good faith one with another. In all proceedings connected with the formation, conduct, dissolution, and liquidation of a partnership, every partner is bound to act in the highest good faith toward his copartners. He must not obtain any advantage over them in the partnership affairs, by the slightest misrepresentation, concealment, threat, or pressure of any kind. The contract of partnership has its foundation in the mutual respect, confidence, and belief in the entire integrity of each partner, and his sincere devotion to the business and true interests of the partnership; and good faith, reasonable skill and diligence, and the exercise of sound judgment and discretion, are necessarily and naturally expected of each party to the partnership. Judge Story in his book on partnership says, on this subject: "Good faith not only requires that every partner should not make any false representations to his partners, but also that he should abstain from all concealments, which may be injurious to the partnership business. If, therefore, any partner is guilty of any such concealment, and derives a private benefit therefrom, he will be compelled to account therefor to the partnership. Upon the like ground, where one partner, who exclusively superintended the accounts

of the concern, had agreed to purchase the share of his copartners in the business for a sum, which he knew, from the accounts in his possession, but which he concealed from them, to be for an inadequate consideration, the bargain was set aside in equity, as a constructive fraud; for he could not in fairness deal with the other partners for their share of the profits of the concern without putting them in possession of all the information, which he himself had, with respect to the state of the accounts and the value of the concern." As illustrations of the good faith which must be observed by one partner to another, so clearly explained by Judge Story, it is a violation of good faith for any partner, in conducting the partnership business, to contract secretly with third persons for any private and selfish advantage and benefit to himself, exclusive of the partnership; for all the partnership property and partnership contracts should be managed for the equal benefit of all the partners. If, therefore, any one partner should contract secretly in a matter of partnership concern for any private advantage or benefit to himself, to the disadvantage or in fraud of his partners, he will be compelled to divide his gains with them. So, if a purchase is made on the partnership account by one partner, who secretly stipulates for and receives any reward or allowance from the seller, for his own private profit, he will be compelled to share with his partners. So, where one partner secretly obtains the renewal of a partnership lease in his own name, he will be held a trustee for the firm in the renewed lease. The obligations of partners, however, whatever they may be, do not prevent either member of the firm from engaging in other business on his own account, but it must not be such business as interferes with or is in any way injurious to the partnership.

Civil Code, Section 2411.

Section 407.—LIABILITY OF PARTNERS TO ACCOUNT.—Each member of a partnership must account

to it, for everything that he receives on account of the firm. While he must render an account of everything he receives, he is at the same time entitled to reimbursement from the firm for everything that he has properly expended for its benefit, and he is entitled to be reimbursed for all losses and risks which he has necessarily incurred on behalf of the firm.

Civil Code, Section 2412.

Section 408.—COMPENSATION FOR SERVICES TO FIRM.—A partner is not entitled to any compensation for services rendered by him to the partnership. A special agreement may be made among the partners that one shall be paid an extra compensation above his share of the profits, for his services, but the obligation rests entirely upon the agreement of the parties. Where there is no agreement of the kind, the law will not allow one partner to take from the partnership assets any compensation for his services. The reason is, that each partner is under obligations to devote his skill and efforts to the promotion of the common benefits of the firm.

Civil Code, Section 2413.

Section 409.—RENUNCIATION OF PARTNERSHIP.—The law of California provides, that a partner may exonerate himself from all future liability to a third person, on account of the partnership, by renouncing, in good faith, all participation in its future profits. To do so, he must give notice to third persons, and to his partner, that he renounces all participation in the future profits of the firm, and that, so far as may be in his power, he dissolves the partnership, and does not intend to be liable on its account for the future. After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his partners may proceed to dissolve the partnership. As to the partners, this renunciation ends the partnership. But as to all other persons the

liabilities of the retiring partner continue until proper notice is given. General notice is sufficient as to the public in general; but as to such persons as have had dealings with the firm, actual notice must be given. A partner retiring from the partnership, in order to relieve himself from further liabilities of the firm, must give actual notice of such retirement, and of the dissolution of the partnership, to such persons as have been accustomed to deal with it. It is not essential that such notice shall be given in any particular form; it may be verbal, or in writing; it may be expressed, or it may be implied from circumstances. It must appear, however, with reasonable certainty, that such persons in some way received actual notice. This is so, because established business relations might lead such parties more readily to give the firm credit. Moreover, they are known to the firm, and may be readily, in some proper way, notified. Such notice given in a regular newspaper of general circulation, published in the city, town, or county where the partnership business is carried on, is the usual method of giving information; and this will be sufficient, when continued for a reasonable length of time,—this depending somewhat upon the nature, extent, and place of the business.

Civil Code, Sections 2417, 2418.

Section 410.—POWER OF MAJORITY OF PARTNERS.—Where the partnership consists of more than two members, the decision of the majority binds the firm in the conduct of its business. The minority must be consulted in good faith, and when this is done the majority of the members have a right to control the manner of conducting the business. The majority can govern only in the due course of business, and cannot change the general character of the business against the will of one dissenting partner.

Civil Code, Section 2428.

Section 411.—AUTHORITY OF INDIVIDUAL PARTNER.—Every general partner is agent for the partnership

in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing. Each partner is the general agent of his copartners as to firm business, and the members of the firm are considered as sanctioning his contracts. Whenever there are written articles, or particular stipulations between the partners, these will regulate their respective power and authority as between themselves, although not, if unknown, in their dealings with third persons. But independently of any such articles or stipulations, each partner possesses an equal and general power and authority in behalf of the firm, to transfer, pledge, exchange, or otherwise dispose of the partnership property and effects, for any and all purposes within the scope and objects of the partnership, and in the course of its trade and business. One partner by virtue of that relation is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authority necessary for carrying on the partnership, and all such authority as is usually exercised by partners in the business in which they are engaged. Any restrictions which, by agreement amongst the partners, are attempted to be imposed upon the authority which one possesses as a general agent for the other, are operative only between the partners themselves, and do not limit the authority as to third persons, who acquire rights by their exercise, unless they know that such restrictions have been made. Each partner may enter into any contracts or engagements on behalf of the firm in the ordinary trade and business; as, for example, by buying, or selling, or pledging goods, or by paying, or receiving, or borrowing moneys, or by drawing, or negotiating, or indorsing, or accepting bills of exchange, and promissory notes, and checks, and other negotiable securities, or by procuring insurance for the firm, or by doing any acts which are appropriate to such trade or

business, according to the common course and usages of the business. So, each partner may consign goods to an agent or factor for sale on account of the firm, and give instructions and orders relating to the sale. All such contracts and engagements, acts and things, he has authority to make and do in the name of the firm; and in order to bind the firm, they must ordinarily be made and done in the name of the firm, otherwise they will bind the individual partner only.

Civil Code, Section 2429.

Section 412.—WHAT PARTNER CANNOT DO.—There are some things which the law of California specially declares one partner alone has no authority to do. (1) He cannot make an assignment of any portion of the partnership property to a creditor, or to a third person in trust for creditors. (2) He cannot dispose of the good-will of the business. (3) He cannot dispose of the whole of the partnership property at once, unless it consists entirely of merchandise. (4) He has no authority to do any act which would make it impossible to carry on the ordinary business of the partnership. (5) One partner has no authority to confess a judgment against the partnership. (6) One partner cannot submit a partnership claim to arbitration.

Civil Code, Section 2430.

Section 413.—PARTNER ENGAGING IN OTHER BUSINESS.—A general partner, who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an interest adverse to that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it. A partner may engage in any separate business which does not create an interest adverse to the partnership, and which does not take too much of his time from the firm's business.

Civil Code, Sections 2436, 2437.

Section 414.—GENERAL LIABILITY OF PARTNER.—Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners.

Civil Code, Section 2442.

Section 415.—LIABILITY OF ONE WHO PERMITS HIMSELF TO BE HELD OUT AS A PARTNER.—Any one permitting himself to be represented as a partner is liable as such to third persons to whom such representation is communicated, and who, on the faith of it, give credit to the partnership. Thus, one who is not actually a partner may make himself liable for the partnership debts, if he knows that he is being represented by the firm as a partner in it, and allows such representation to be made, and it is acted upon in good faith.

Civil Code, Section 2444.

Section 416.—DOING BUSINESS UNDER FICTITIOUS NAME.—The law provides that every partnership transacting business in this State under a fictitious name, or designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which its principal place of business is situated, a certificate stating the names in full of all the members of such partnership and their places of residence, and must publish the same once a week for four successive weeks in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county. There is one exception, in the case where a commercial or banking partnership, established and doing business in a foreign country, seeks to do business in this State; a foreign firm may use the same partnership name it uses at home, although fictitious, and although it does not show the names of the persons interested as partners. The certificate must be signed by the partners, and acknowledged by them, and must be

published within one month after the formation or commencement of the partnership. A new certificate must be made and published whenever there is a change in the membership of the partnership.

Civil Code, Sections 2466, 2467, 2468, 2469.

Section 417.—SPECIAL PARTNERSHIPS.—The law of France has long provided for a kind of partnership known as "special partnership," which differs from a general partnership in several important particulars, and some of the States in this country have copied the French law and made it a part of their statutes. California is one of the States which have adopted the law on special partnerships, and fully recognizes by statute the existence and rights and liabilities of special partners. A special partnership may be formed in this State by two or more persons, for the transaction of any business except banking or insurance. A special partnership may consist of one or more general partners and one or more special partners.

Section 418.—CERTIFIED STATEMENT OF SPECIAL PARTNERSHIP.—When a special partnership is formed the partners must sign a certificate stating the name under which the partnership is to be conducted; the general nature of the business intended to be transacted; the names of all the partners, and their residences, specifying which are general and which are special partners; the amount of capital which each special partner has contributed to the common stock; and the time at which the partnership will begin and end. This certificate must be acknowledged and recorded in all the counties in which the firm has places of business. An affidavit of each of the partners must be filed for record with the certificate, stating that each of the special partners has paid in the sum named in the certificate. The certificate, or a statement of its substance, must also be published in a newspaper in the county where the original certificate is filed;

and if there is no newspaper in that county, then the publication must be made in the nearest newspaper; and this publication must be made once a week for four successive weeks, beginning within one week from the time of filing the certificate for record.

Civil Code, Sections 2479, 2480, 2481, 2483, 2484.

Section 419.—SPECIAL PARTNERSHIP—LIABILITY OF THE PARTNERS.—The general partners in a special partnership are liable to the same extent as partners in a strictly general partnership. They are each liable for all the debts of the firm. But a special partner is only liable for the debts of the firm to the extent of the capital he has put into the business. A special partner may do things which will make him liable as a general partner; for if it appears that he has wilfully made a false statement in the certificate of partnership, or if he wilfully interferes with the business of the firm, or if he represents himself as a general partner in the firm, he will be liable as a general partner; that is, he will be liable for all debts of the firm.

Civil Code, Sections 2500, 2501.

Section 420.—RIGHTS OF SPECIAL PARTNERS.—Only the general partners have authority to transact the business of a special partnership. The special partner, while he has no right to engage in or interfere with the authority of the general partners to conduct the business of the firm, yet may at all times investigate the partnership affairs, and advise his partners, or their agents, as to their management of the business. A special partner may lend money to the partnership, or advance money for it, and take from it security, and as to such loans or advances he will have the same rights as any other creditor; but in case of the insolvency of the firm, all other claims which he may have against it will be postponed until all other creditors are satisfied. In all matters relating to a special partnership, the general partners may sue and be sued alone,

as if there were no special partners. No special partner, under any pretense, has any right to withdraw any of the capital invested by him in the partnership, during its continuance.

Civil Code, Sections 2489, 2490, 2491, 2492, 2493.

Section 421.—INTEREST AND PROFITS OF SPECIAL PARTNER.—A special partner may receive such interest on his money invested, and such proportion of the profits, as may be agreed upon between him and the general partners.

Section 422.—MINING PARTNERSHIPS.—A mining partnership is different in its nature and creation from the ordinary partnerships known to commercial life. An express agreement to become partners, or to share the profits and losses, is not necessary in the creation or existence of a mining partnership. The law of California provides, that a mining partnership arises from the ownership of shares or interests in the mine, and the working of the mine for the purpose of extracting the mineral from it. The miners must own or have acquired the mine, and be actually engaged in working it; and when they do so, the law looks upon their relations as those of a partnership, without the necessity of a written or oral agreement to share profits and losses. It is not necessary that the miners hold the legal title to the mine in order to become partners. If they acquire a mining claim, though it is not patented, and may never be, still they are mining partners if they actually engage in working the mine for the purpose of extracting the mineral from it. The mining partners need not all have equal interests in the profits. If a number of miners acquire a claim and work it, on shares, whether the shares be equal or not, it is a mining partnership. The essential difference between the ordinary partnerships and a mining partnership is, that in a mining partnership there is no choice of partners. One member of a mining

partnership may sell his interest or share in the mine, and the partnership is not dissolved, and as to those who continue to work the mine, the partnership continues to exist; while in a general partnership, the sale by one partner dissolves the partnership, because none of the general partners can force a new member into the firm.

Civil Code, Sections 2511, 2512.

Section 423.—PROFITS AND LOSSES IN MINING PARTNERSHIP.—A mining partner shares in the profits and losses in proportion to the interest or share which he owns in the whole mine, and the proportion which his interest bears to the whole partnership capital or whole number of shares.

Section 424.—LIABILITY OF MINING PARTNERS.—Each mining partner is, as to third parties, liable for the entire debts of the partnership. If one mining partner pays the debts, or advances money for the use of the partnership, he has a lien on the property of the partnership for his money. And the law declares that this lien shall exist, even though there is an agreement among the partners that it must not.

Civil Code, Section 2514.

Section 425.—MINING GROUND PARTNERSHIP PROPERTY.—The mining ground owned and worked by partners in mining, whether purchased with partnership funds or not, is partnership property. But a mere agreement to work a mine in the future, upon the happening of a contingency, does not make it partnership property. Justice Temple, of the Supreme Court of California, in the mining case of Dorsey vs. Newcomer, speaking of the partnership property of miners, said: "It is not always easy to determine what constitutes the partnership property of a mining partnership. The statute provides that the mining ground owned and worked by partners in mining, whether

purchased by the partnership or not, is partnership property. It does not follow that property other than the ground owned and worked may not also be partnership property. No doubt, other property acquired by the partnership for the purpose of aiding in working the mining claim, such as a mill or mill site, would also be property of the partnership. So, other mining ground acquired for the purpose of working with the mining ground already being worked, and so situated that it can be worked with the original claim as parts of one mine, would be partnership property. And, generally, property acquired by the partnership by the use of partnership funds, as distinguished from the individuals constituting the firm, may be so regarded. But the statute evidently distinguishes between ground owned or acquired for the purpose of working, and ground actually worked. It is only the last that in general can be regarded as partnership property, when not acquired by the partnership, or by the use of its funds." (Decided by the Supreme Court of California, in the case of Thomas B. Dorsey vs. J. T. Newcomer, which decision is printed in Volume 121 of the California Reports, page 213.)

Civil Code, Section 2515.

Section 426.—**NEW MEMBER OF MINING PARTNERSHIP.**—One of the partners in a mining partnership may sell his interest in the mine and business without dissolving the partnership. And the purchaser, from the date of his purchase, becomes a member of the partnership. But the purchaser of an interest in the mining ground takes it subject to the liens existing in favor of the partners, for debts due the creditors, or advances made for the benefit of the partnership, of which he has notice; and the purchaser of the interest of a partner in a mine when the partners are engaged in working it, is charged by the law with notice of all liens resulting from the relation of the partners to each other and to the creditors of the partnership.

Civil Code, Sections 2516, 2517, 2518.

Section 427.—CONTRACT IN WRITING.—No member of a mining partnership, or any agent or manager of the firm, can bind the partnership by a contract in writing, except by express authority from all the members of the firm. He cannot bind the partnership by making a promissory note, or by any agreement in writing affecting the partnership property.

Civil Code, Section 2519.

Section 428.—OWNERS OF MAJORITY OF SHARES GOVERN CONDUCT OF MINE.—The decision of the partners owning a majority of the shares or interests in a mining partnership will always control the conduct of its business. As the mining property can only be used as a whole, it is indispensable in conducting the business of mining that those owning the larger portion of the property should have the power to control, in case all cannot agree, for otherwise the work might become wholly discontinued at any time. The powers of the individual members of a mining partnership are much more limited than are the powers of the individual members of a purely commercial or trading partnership. What may be necessary and proper for carrying on the business of mining, for the joint benefit of all concerned, must always be determined by those owning and holding in the aggregate the majority interest in the property. And if the powers which are thus exercised by the majority are not necessary and proper for the success of the enterprise, those whose interests may be imperiled or disastrously affected by the improper conduct of the majority have the right to resort to the courts for redress and protection.

Civil Code, Section 2520.

Section 429.—DURATION OF PARTNERSHIP.—If no term is prescribed by agreement for the duration of a partnership, a general partnership will continue for an indefinite time, until dissolved by mutual consent, or by a partner, or by the law.

Section 430.—TOTAL DISSOLUTION OF PARTNERSHIP.—A general partnership is dissolved as to all of the partners: (1) By lapse of the time prescribed by agreement for its duration; (2) By the expressed will of any partner, if there is no such agreement; (3) By the death of a partner; (4) By the transfer to a person, not a partner, of the interest of any partner in the partnership property; (5) By war, or the prohibition of commercial intercourse between the country in which one partner resides and that in which another resides; or, (6) By a judgment of dissolution. But, as we have already seen, there is an exception in the case of a mining partnership, which is not dissolved by the death of one partner or the sale of the partner's interest.

Civil Code, Section 2450.

Section 431.—PARTIAL DISSOLUTION OF PARTNERSHIP.—A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance; subject, however, to liability to his copartners for any damage caused them.

Civil Code, Section 2451.

Section 432.—WHEN PARTNER ENTITLED TO DISSOLUTION.—A partner is entitled to a dissolution, (1) When he, or another partner, becomes legally incapable of contracting; (2) When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or, (3) When the business of the partnership can be carried on only at a permanent loss.

Partners may, at the time of forming the partnership, prescribe the period for which it shall endure, and how and when it may be determined. Its continuance may be for a definite term, or it may be at the will of the partners; and it is well settled that a partnership at will may be terminated at the pleasure of any member of the firm, so

long as he acts without fraudulent intent. As partnerships are formed by the mutual agreement of all the partners, so may they be altered, modified, or dissolved, by like agreement. A partnership for a definite period may be dissolved by mutual consent. But an express agreement to dissolve is not necessary. Words and acts implying such intention are sufficient. If partners, by mutual consent, cease to do business, and divide the partnership property, this amounts to a dissolution, as much as if done by an express agreement to that effect. A partnership is none the less ended by reason of the fact that certain specific property of the firm, after a settlement and adjustment of the firm business, remains unsold, and that each partner, under the settlement, retains his proportionate part of such property.

Notwithstanding that a time for the dissolution of a firm may be fixed by partnership articles, or that the partners may dissolve by agreement, express or implied, before such time, the partnership may be dissolved by the happening of any of the events which, in law, are held to effect that result. Thus, the withdrawal of a partner causes a dissolution of the firm; and the introduction of a new member into an existing partnership works its dissolution, and the creation of a new partnership. If both partners refuse to perform their part of the partnership agreement, there is no law requiring, or recognizing, a continuance of the partnership. A firm is dissolved when it ceases to do the business for which it was organized.

The mere fact, alone, that a partnership is insolvent does not operate as a dissolution of the firm. There must be a stoppage of payment, assignment, or act amounting in law to a declaration of insolvency, to work a dissolution. An assignment, however, by copartners, for the benefit of their creditors, of the entire firm assets, except property exempt from execution, operates as a dissolution of the partnership.

The mere filing of an attachment against partnership property does not dissolve the partnership; nor will the

mere seizure of such property under a writ of attachment have that effect; and it has been held by the courts that the seizure under execution of the interest of a defendant in partnership property does not dissolve the partnership; but a levy of execution against one partner on his interest in the firm, and the sale of such interest, does dissolve the firm.

A sale which practically includes all of the property used by a firm in carrying on its business, whether made by the firm or by a member, operates as a dissolution of the partnership. The destruction of the property which is the subject matter of the copartnership is another cause which will work a dissolution. A court of equity may decree the dissolution of a partnership during the term for which it was entered into, and declare it void, where there is fraud, imposition, misrepresentation, or oppression in the original agreement.

Equity has jurisdiction, where a person has been induced by fraudulent representation to enter into a partnership, to rescind the contract at his instance, and put an end to it. Misrepresentation of material facts is a ground for setting aside a partnership contract. A person who has been induced to enter into a partnership, by a material misrepresentation of the other party, is entitled to have the contract set aside.

One partner cannot, by any act of his own, and at his will, terminate a partnership for a fixed period, before that period has elapsed. A partnership agreement, like any other, is binding upon the parties, and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other, without a sufficient cause.

A court of equity may decree a dissolution of the partnership, for causes arising subsequently to the formation of the contract, founded upon misconduct, or fraud, or violation of duty, of one partner; or on account of the inability or incapacity of one partner to perform his obligations and duties, and to contribute his skill, labor,

and diligence in the promotion and accomplishment of the objects of the partnership; or for the existence of facts rendering it impracticable to carry on the undertaking for which the partnership was formed.

A court of equity will dissolve a partnership where all confidence between the partners has been destroyed, so that they cannot proceed together in prosecuting the business for which it was formed. And this result follows, not only where such want of confidence is occasioned by the misconduct or gross mismanagement of the partner against whom the dissolution is sought, but also when such want of confidence and distrust has arisen from other circumstances, provided it has become such as cannot probably be overcome. But a partner who, by his own wilful misconduct, has caused such want of confidence, will not be allowed to take advantage of it to procure a dissolution. If a partner's acts are inconsistent with the duty of partners, and of a nature to destroy the mutual confidence which ought to subsist between them, and makes it impossible that the business can be conducted in partnership with benefit to either party, a court of equity will decree a dissolution before the expiration of the term for which the partnership was entered into. The same is true where the circumstances have so changed as to render it impossible to carry on the partnership without injury to all the partners. A partnership will be dissolved where one of the firm has deliberately resolved to break up and ruin its business, or where ill feeling between the partners renders it impossible to conduct the business successfully.

The wrongful exclusion of one partner from the business, or refusal to allow him to inspect the books, is a cause for dissolution of the partnership.

It is a sufficient cause for dissolution of a partnership that it clearly appears that the business for which the partnership was formed is impracticable, or cannot be carried on except at a loss.

A partner's failure or refusal to comply with the terms of the partnership agreement as to contributing capital or funds required for the successful prosecution of the business is also a cause for dissolution, whether such failure or refusal arises from disinclination or inability. Thus, if a partnership is formed for the purpose of buying and selling land, each partner to furnish an equal share of money, the refusal of one to make the necessary advances would be a good cause for putting an end to the partnership. And, if a partner refuses to manufacture articles as agreed, so as to make the works profitable, it is a cause for dissolution.

If a partner, by reason of his infirmities, becomes totally incapable of performing the partnership duties incumbent upon him, a dissolution will be decreed, not only to protect the partner who has become incapacitated, but to relieve the other from the difficult position in which he is placed. Confirmed and incurable insanity is a ground for dissolving a partnership, and when it is shown that a partner is so far disordered in his mind as to be incapable of conducting the firm business according to the terms of the contract of copartnership, a court of equity will dissolve the firm. After an adjudication of the insanity of one partner, the continuing partner may apply for a dissolution of the partnership, if he so desires; or, if it is a partnership at will, he may dissolve it of his own volition; but where one partner has been adjudged insane, and the remaining partner continues the business as before, without objection or notice to any one, it is presumed that he did not intend a dissolution of the firm, but that he waited to determine whether the incapacity of his partner would prove merely temporary, and whether it would become practicable for him to resume business. So long as he thus continues to carry on the business, without seeking to dissolve the partnership, there is no dissolution, nor is he excused from accounting for the profits derived by him from the business of the firm.

Partners may provide in their contract that certain acts or conduct shall operate to dissolve the partnership; but, in the absence of special agreement, courts may dissolve a partnership for misconduct, gross neglect, or breach of partnership duty. As a general rule, gross misconduct, want of good faith, or gross want of diligence, or such cause as is productive of serious and permanent injury to the partnership concerns, or renders it impracticable to carry on the partnership business, is proper ground for dissolution. Habitual intoxication, extravagance, and dishonesty are good grounds for dissolution.

If quarrels, dissensions, or chronic hostility between partners are of such serious and permanent character as to prevent the profitable continuance of the partnership business, on the terms of the agreement between the partners, a dissolution will be decreed. Violent disputes, ill will, or dissensions between the partners, which entirely prevent the beneficial effects of a connection, are sufficient to justify a decree of dissolution. A dissolution should be decreed where it appears that the partners are in a constant state of quarrel; that one makes a rule of going to the office at an early hour, opening all the letters addressed to the firm, and failing to communicate the contents to the other; that the other partner is always arbitrary in his action; and that, generally, what one wants to do the other objects to.

A court of equity will not dissolve a copartnership unless cause is shown, and the mere desire of a partner for a dissolution is not a sufficient cause. It is not for every act of misconduct on the part of one partner that a court of equity, at the instance of another partner, will dissolve the partnership and close up the affairs of the company. The court will require a strong case to be made, and it is a general principle that a court has no jurisdiction to make a separation between partners for trifling causes, or temporary grievances, involving no permanent mischief. Thus, it is not sufficient cause for the dissolution of a firm that a loss occurs to it through a partner's mere error of

judgment, or that there is a mere dissatisfaction between partners. A court of equity will not decree a dissolution of a partnership, unless it is shown that the defendant has substantially failed in the performance of his part of the partnership agreement.

Civil Code, Section 2452.

Section 433.—NOTICE OF DISSOLUTION OF PARTNERSHIP.—The liability of a general partner for the acts of his copartners continues, even after a dissolution of the copartnership, in favor of persons who have had dealings with and given credit to the partnership during its existence, until they have had personal notice of the dissolution. The liability of a partner may extend beyond the indebtedness existing at the dissolution, and include indebtedness subsequently contracted in favor of persons relying on the partnership, and who did not have any notice of its dissolution. Those who have dealt with the firm before dissolution are entitled to hold all the partners liable for debts contracted afterwards in good faith, in the belief that the firm still continues, and in reliance upon its assets and the personal responsibility of its members. As to such customers, actual notice is required to exempt from liability any member of the firm, though he has retired. The fact that notice was mailed to such customer, or was published in a newspaper of general circulation, and such newspaper mailed to a creditor with a red line drawn about the notice for the purpose of attracting attention to it, or that the dissolution had attained general notoriety, cannot defeat the customer's claim to hold all the members of the firm answerable, if it appears that he did not have actual notice of the dissolution. Persons who have not dealt with the firm before its dissolution are not entitled to actual notice, and cannot hold a retiring member answerable if notice of the dissolution has been given by publication in a newspaper. A change of the partnership name, which plainly indicates the withdrawal of a partner, is sufficient notice of the fact

of such withdrawal to all persons to whom it is communicated; but a change in the name, which does not contain such an indication, is not notice of the withdrawal of any partner.

Civil Code, Sections 2453, 2454.

Section 434.—WINDING UP THE PARTNERSHIP AFFAIRS.—After the dissolution of a partnership, its affairs must be wound up, and its property disposed of. No new contracts are to be made, no new business transacted; but only the final disposition of the assets of the firm, the collection of the accounts, the payment of the debts, the distribution of the property left over. Any member of a general partnership may act in the winding up of its affairs. By consent of all the partners, the final settlement of the affairs of the firm may be committed to one of the partners, and the other partners will then have no right to act. The partner authorized to act in liquidation may collect, compromise, or release any debts due to the partnership, and pay or compromise any claims against it, and dispose of the partnership property; he may also indorse, in the name of the firm, promissory notes or other obligations held by the partnership, for the purpose of collecting them, but he cannot create any new obligation in the name of the firm.

Civil Code, Sections 2459, 2460, 2461, 2462.

Section 435.—RIGHTS OF PARTNERS AFTER DISSOLUTION.—Each partner, after the dissolution of the firm, has an equal right to the possession of its assets. And if the liquidation of the partnership affairs is not left in the hands of certain members of the firm, by consent of all the partners, then each partner has the right to do whatever acts are necessary to complete the business of the partnership, and fulfil its contracts; and, as each partner is interested in seeing the business closed, by the collection of the assets, and the payment of the firm's obligations, and

a division of the remainder, each may take steps looking to that end, and exercise the power vested in him as a partner to dispose of and preserve the property of the firm and pay its obligations. After the dissolution of the firm, each of the partners has the right to enter into the same or any other business on his own account. If property of the firm is in the possession of one of the members of the partnership, he has the power to take such measures as are necessary for its preservation and protection. Each of the partners, in the absence of an agreement to the contrary, is bound to give his services to the business of the firm, and this remains true after its dissolution so far as is necessary to the winding up of its affairs. After the dissolution of the partnership, each partner remains liable for the indebtedness of the firm, to the same extent as before.

Section 435a.—FORM OF PARTNERSHIP AGREEMENT.—The following is a form of partnership agreement:

Articles of Copartnership, made and entered into the ..... day of ....., 190.., between ....., of ....., State of California, and ...., of the same place:

The said parties above named have agreed, and by these presents do agree, to become partners in business together, under and by the name, firm, and style of (here state name of firm), in the business of (here state the kind of business to be transacted by the firm), at (here state name of place where the business is to be conducted), State of California; their copartnership to commence on the ..... day of ....., 190.., and to continue ..... years thence next ensuing, fully to be completed and ended, and to that end and purpose the said parties have delivered in as capital stock the sum of ..... Dollars, gold coin of the United States, share and share alike, to be used and employed in common between them, for the support and management of the said business, to their mutual benefit and advantage. And it is agreed, by

and between the said parties, that at all times during the continuance of their copartnership, they and each of them will give their attendance, and do their and each of their best endeavors, and to the utmost of their skill and power exert themselves, for their joint interest, profit, benefit, and advantage, in the business aforesaid; that they shall and will, at all times during their copartnership, bear, pay, and discharge, equally between them, all rents and other expenses that may be required for the support and management of the said business; that all gains, profits, and increase that shall come, grow, or arise from or by means of the said business, shall be divided between them, share and share alike; and all loss that shall happen to their said joint business, by bad debts, or otherwise, shall be borne and paid equally between them; that there shall be kept, at all times during the continuance of their copartnership, perfect, just, and true books of accounts, wherein each of the said copartners shall enter and set down, as well all money by them, or either of them, received, paid, laid out, and expended, in and about the said business, as also all the goods, wares, merchandise, and commodities, by them, or either of them, bought or sold, by reason or on account of the said business, and all other matters and things whatsoever, to the said business and management thereof in anywise belonging; which said books shall be used in common between the said copartners, so that either of them may have access thereto without any interruption or hindrance of the other; that the said copartners, once in each year, during the continuance of the said copartnership, as aforesaid, to-wit: on the ..... day of ....., in each year, or oftener if necessary, shall make, yield, and render, each to the other, a true, just, and perfect inventory and account, of all the profits and increase by them, or either of them, made, and of all loss, by them, or either of them, sustained, and also of all payments, receipts, disbursements, and of all other things by them made, received, disbursed, acted, or suffered, in their said business; and the said account being so made, they shall and will clear and adjust, each to the other, at the time, their just share of the profits so made as aforesaid; that during the continuance of the said copartnership, neither of them shall or will indorse any note, or otherwise become security for any person or persons whomsoever, without the consent of the other said copartner; that at

the end of said term, or other sooner determination of their copartnership, the said copartners, each to the other, shall and will make a true, just, and final account of all things relating to their said business, and in all things truly adjust the same; and that all and every stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them, share and share alike.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

.....(Seal.)

.....(Seal.)

Surveys of Land

Section 436.—PUBLIC AND PRIVATE LAND SURVEYS.—One of the fruitful causes of litigation in California, litigation which involves the title and possession of land in nearly every county in the State, and the legal rights and obligations of thousands of people, is the question of the correctness of public and private land surveys. Therefore, every owner of land, especially in the rural districts of the State, is interested in knowing something about the law relative to public and private land surveys.

Section 437.—GOVERNMENT SURVEYS.—It is important for the landowner, when he believes or is informed that others are encroaching upon the lines of his land as originally surveyed and established, to know what the law is as to Government surveys. For private surveys, made by County Surveyors or other surveyors at the request of individual owners, can have but one object, and that is to find where the lines were originally established by the Government survey. For the purpose of giving such information as may be of value to the landowner, the following sections under the head of "Surveys of Land" have been prepared.

Section 438.—GOVERNMENT SURVEY ACCEPTED AND APPROVED IS FIXED AND UNCHANGEABLE.—First, it is important to know, that a survey accepted and approved by the Government of the United States is fixed and unchangeable. People may think that the original survey was not correct, but that makes no difference. As a matter of fact, very few Township surveys are absolutely correct, and in many of them serious errors were made as reported by the Government surveyors. And, too, many of those who took contracts to survey Government lands were dishonest or incompetent, or both together, and instead of going over the ground, this class of surveyors contented themselves with sitting on a rock and guessing at the surrounding country. But it was in the interest of the peace and security of settlers upon the public domain that their occupation of the land should not be disturbed afterwards by the claim that the Government survey was not properly or correctly made; and as all titles to land in this country run back to the original ownership of the Government, it is evident that the extent and lines of any particular lot of land must rest upon the original survey made for and accepted by the United States; and for the purpose of security in titles, and so that private surveys may have something solid to rest upon, the Government of the United States has adopted the unvarying rule, that a survey accepted and approved by the Government of the United States, whether correct or incorrect, is final and conclusive, fixed and unchangeable, and neither oral evidence nor private surveys can be admitted to contradict it.

Section 439.—FINDING ORIGINAL LOCATION OF TOWNSHIP LINE.—After many years, it frequently happens that adjoining land owners will differ as to the place where the Government surveyor really located a Township line, and to ascertain its true location in the lapse of a quarter of a century or more may be a matter of much difficulty for private surveyors. Mounds of stone may have

fallen down and become scattered so as to lose their identity; corner stakes may have been burned away or pulled up and cast aside; witness trees may have disappeared, by fire, or the ax, or by natural decay, or force of storms; so that all or nearly all of the monuments marked and placed upon the line by the Government surveyor, as he ran and established it, may have become obliterated and lost in the course of time. But the law has established certain rules and regulations for the guidance of private surveyors under such circumstances, which rules and regulations must always be followed by a surveyor seeking to locate the place where the line was originally established, if he expects to make a survey that will be of any value to his employer.

Section 440.—FIELD NOTES AND MAPS.—A private surveyor, seeking to find the true location of the Government lines, should have with him the field notes and maps of the original survey, certified copies of which can be obtained from the office of the United States Surveyor-General through the office at San Francisco. The field notes are always to be considered before the maps. The field notes made by the Government surveyor afford the best evidence of the place where the line was located, and control the maps or plats. The maps are made from the field notes, therefore the field notes are entitled to first consideration.

Section 441.—MONUMENTS ON THE GROUND.—The private surveyor, employed to locate the Government line, must find the monuments on the ground, called for by the field notes. If the original stakes, and mounds of rock, and witness trees, marked for Section corners and quarter Section corners, and closing corners on the Township line, are all in place, where the Government surveyor put them, and as called for by the field notes, the work of the private surveyor will be easy. But in controversies

which arise over boundaries of land, it nearly always happens that most of the artificial monuments, the stakes, and mounds, have disappeared, and that some of the witness trees cannot be found. It is the duty of the private surveyor to try to find the stakes set by the Government surveyor, of course; but if he finds stakes, with the right marks for certain corners, it may be denied that they are the original stakes, or it may be claimed that they have been moved from the place where the original surveyor placed them. So that the natural objects called for by the field notes, objects which never change, and cannot be moved, such as creeks, rivers, bluffs, roads or trails, ponds, ridges, or other permanent features of the earth's surface, when found by the private surveyor in the position corresponding to the calls of the field notes, are really the most certain and satisfactory evidence that he is on the right line. And from the observations above made, it may be said, that the rule as to monuments which must govern the private surveyor in his work, and which will always be safe for the land owner for whom the work is being done, is as follows: It was the duty of the Government surveyor to note all natural objects in his field notes, and in trying to find where the Township line was actually run and established by the Government survey, the private surveyor must give careful consideration, with reference to the field notes, to permanent monuments set, their size, kind, and location, with reference to the corners which they are intended to perpetuate; bearing or witness trees marked in the field; all nearest known original corners, in all directions, following section lines; all natural objects called for by the field notes, such as creeks, rivers, bluffs, roads or trails, ponds, ridges, or other unchanging features of the earth's surface.

Section 442.—TOWNSHIPS.—The public lands of the United States are primarily surveyed into uniform rectangular tracts, six miles square, called Townships, bounded by

lines conforming to the cardinal points—North, South, East, and West—and containing, as nearly as may be, 23,040 acres.

Section 443.—SECTIONS.—The Townships are subdivided into thirty-six tracts, one mile square, called Sections, containing in full Sections 640 acres. The Sections in a Township are numbered consecutively from 1 to 36, beginning at the Northeast corner of the Township and numbering West with the North tier of Sections, thence East with the second tier, West with the third tier, and so on to Section 36 in the Southeast angle of the Township.

Section 444.—SUBDIVISIONS OF SECTIONS.—Sections are divided into four equal parts of 160 acres each, called quarter Sections, and each quarter Section is again divided into two half-quarter Sections of 80 acres, or four quarter-quarters containing 40 acres each. These are called Legal Subdivisions, and are the only divisions recognized by the Government in disposing of the public lands, except where tracts are made fractional by water courses or other causes. When tracts are fractional, the smallest legal subdivision may contain less than 40 acres or more than 40 acres, and they are then designated as Lots, to distinguish them from the legal subdivisions which contain exactly 40 acres. The subdivisions of Sections are not actually surveyed and marked on the ground. Quarter section or half mile posts are established on the boundaries of the Sections; but the interior subdivisional lines of Sections are made only on the plats of Townships, at the Surveyor-General's office, and when the boundaries of these subdivisions are required to be established on the ground, it must be done by a private survey.

Section 445.—PRINCIPAL MERIDIANS AND BASE LINES.—Two principal lines are established prior to the survey of the Townships—a north and south line denominated

a Principal Meridian, and an east and west line styled a Base Line. These lines constitute the basis of the public surveys, and are prerequisite to the laying out of the Township.

Section 446.—RANGES.—Any number or series of Townships situated in a tier North and South are denominated a Range, and the Ranges are designated by numbers East and West, as the case may be, from the governing meridians. The Townships in each Range are also numbered North or South from established base lines.

Section 447.—STANDARD CORNERS.—At the time the parallels and base line are run, the Township, Section, and quarter Section corners are established thereon. As the Township and Section lines North are run from them, it follows that these corners will be common to two Townships, Sections, or quarter Sections North of the parallel or base line, and these are called Standard Corners.

Section 448.—CLOSING CORNERS.—North and South lines are required to run on the true meridian. Hence, when the Township and Section lines below reach the parallels or base lines North, they will not close on the Standard Corners if the field of operation be West of the convergency of the meridians, but will strike the line at a distance corresponding to the convergency; East of the Standard Corners if the field of operation be West of the governing meridian, and West of said corners if the surveys be East of the principal meridian. Another set of Township and Section corners is therefore established at the point of intersection with the standard or base line, and the distances of said corners from the corresponding standard corners previously set, are measured and noted in the field book. The corners so established are called Closing Corners, and will, of course, be common to two Townships or Sections South of the base or standard line. No closing quarter Section corners are established.

Section 449.—TOWNSHIP CORNERS.—Township corners are established at intervals of six miles each, and are perpetuated by the following modes: (1) The post is placed first in order, because circumstances render its use most common in practice. Corner posts are required to be four feet in length, and at least five inches in diameter, and are to be planted to the depth of two feet, the part projecting above the ground being squared to receive the marks required to be cut upon them. When the corner is common to four Townships, the post is set cornerwise to the lines, presenting the angles to the cardinal points, and on each flattened side must be marked the number of the Township, Range, and Section which it faces. Six notches will also be cut on each of the four edges. If the post is on a standard parallel or base line, and is common to only two Townships on the North, six notches will be cut in the East, North, and West edges, and the letters "S. C." (Standard Corner) will be cut on the flattened surface, but no notches will be cut in the South edge. If the post is common to two Townships South of the parallel or base line, six notches will be cut in the East, South, and West edges, but none in the North edge, and the letters "C. C." (Closing Corner) must be cut upon the flattened surface. The position of all Township corner posts must be witnessed by four bearing trees, one in each of the adjoining Townships, or by "pits," where trees cannot be found. (2) Township corner stones must be inserted in the ground not less than eight inches, with their sides to the cardinal points, and small mounds of stone should be constructed against the sides of them. The notches on the edges are the only marks required. (3) A tree in place, when employed to perpetuate a Township corner, must be marked and witnessed in the same manner as township posts. (4) The post and mound is a common method of marking corners. Mounds at Township corners must be 5 feet in diameter at their base, and 2½ feet in perpendicular height. Posts in Township mounds, therefore, require to be 4½

feet in length, so as to be planted 12 inches in the ground, and allow 12 inches to project above the mound. The pit for a Township mound will be 18 inches wide, 2 feet in length, and at least 12 inches deep, located 6 feet from post, and on opposite sides. At corners common to four Townships, the pits will be placed on the line and lengthwise to them. On base and parallel lines, where the corners are common to only two Townships, three pits only will be dug—two in line on either side of the post, and one on the line North or South of the corner, as the case may be. By this means the standard and closing corners can be readily distinguished from each other. Posts in mounds should be notched, marked, and faced precisely as posts without the mound.

Section 450.—SECTION CORNERS.—Section corners are established at intervals of 1 mile or 80 chains, and four modes of perpetuating corners are employed to mark them,—(1) Post for Section corner must be 4 feet in length and 4 inches in diameter, firmly planted or driven into the ground to the depth of 2 feet, the part projecting being squared to receive the required marks. When the corner is common to four sections, the post will be set cornerwise to the line, and on each flattened surface will be marked the number of the Section which it faces; also, on the Northeast face, the number of the Township and Range will be cut. All mile posts on Township lines will have as many notches on the two corresponding edges as they are miles distant from the respective Township corners. Section posts in the interior of a Township will have as many notches on the South and East edges as they are miles from the South and East boundaries of the Township, but no notches on the North and West edges. By this plan the corner can be identified thereafter, if the post be found lying upon the ground. All Section posts, whether in the interior of a Township or on a Township line, must be witnessed by four bearing trees, one in each of the

adjoining Sections. When the requisite number of bearing trees cannot be found, the deficiency will be supplied by substituting pits 18 inches square, and not less than 12 inches in depth. (2) Mounds at Section corners will be 4½ feet in diameter at their base, and 2 feet in perpendicular height; the post being 4 feet in length and inserted 12 inches in the ground. The post must be not less than 3 inches square, and marked and witnessed the same as the post without the mound. At corners common to four Sections, the post in mound will be set with the edge to the cardinal points; at corners common to only two Sections, the flattened sides of the post will face the cardinal points. (3) When stones are used for Section corners on Township lines, they will be set with their edges in the direction of the line; but when standing for interior Section corners, they will be planted facing the North, and should be notched the same as Section posts similarly situated. No marks except the notches are required, but they will be witnessed by trees or pits as required where posts are used. A tree placed at a Section corner is marked the same as a Section post.

Section 451.—QUARTER SECTION CORNERS.—Quarter Section corners are established at intervals of half a mile, or 40 chains, except in the North and West tiers of Sections in a Township. Where the Section lines exceed or fall short of 80 chains, in subdividing these Sections, the quarter post is established just 40 chains from the interior Section corner, throwing the excess or deficiency upon the last half mile. The intervals between the quarter posts and the North and West Township boundaries will therefore be irregular. Quarter Section corners are not required to be established on the North boundary of the Northern tier of Sections in a Township South of and bordering on a standard parallel or base line. Quarter Section corners are perpetuated in the following manner: (1) Posts at quarter Section corners must be 4 feet in length and 4

inches in diameter, and be planted or driven into the ground 2 feet; the part projecting being flattened or squared, so as to present a smooth surface 3 inches in width. The only mark required on a quarter Section post is the character "¼S." The corner must also be witnessed by two bearing trees. (2) Mounds at quarter Section corners will be 4½ feet in diameter at their base, and 2 feet in perpendicular height, the post being 4 feet in length and inserted in the ground 12 inches; it will also be marked and witnessed the same as the post without the mound. (3) Stones used for quarter Section corners must have the fraction "¼" cut upon the West side of North and South lines, and on the North side of East and West lines, and must be witnessed by two bearing trees. (4) A tree, when found in place, should be marked and witnessed in the same manner as the post.

Section 452.—MEANDER CORNERS.—At the points where Township or Section lines intersect large ponds, lakes, bayous, or navigable rivers, posts are established at the time of running the lines, which are called Meander Corners. Either of the four modes described for perpetuating corners may be employed for perpetuating meander corners. (1) No marking is required on meander posts, but they must be witnessed by two bearing trees or pits. They should also be firmly inserted in the ground. (2) The mound and post at meander corners should be the same dimensions as those for the Section and quarter Section corners. The pit should be directly on the line, and 8 links further from the water than the mound. When the pit cannot be so located, its course and distance from the corner should be stated in the field book. (3) Stones or trees may be employed to perpetuate meander corners, and when so used, must be witnessed the same as meander posts.

Section 453.—GOVERNMENT LINES AND CORNERS MUST CONTROL.—As has been said before,

where the corners are established by the proper officer in pursuance of the system of subdivision authorized by law, they must be regarded as the true corners which they represent, even if it is subsequently found that any post or corner is out of line, or that the intervals between posts are unequal or incorrect; for no party has a right to correct such errors except the general Government, and it possesses the power only while the title to the lands affected by the change is yet in the United States. After the lands have passed into the hands of private parties, the Government lines and corners, as marked in the field, must control in determining the boundaries of all legal subdivisions, when they can be found and identified; and when they are missing, recourse must be had to the official plats and field notes of the Government surveyor.

Section 454.—RESTORING LOST CORNERS.—When extinct lines or corners of the public lands are required to be reestablished, a County Surveyor or other competent person is usually employed by private parties. It is not the province of the General Land Office to direct the operations of any but Government surveyors engaged in the public service; yet obliterated boundaries must be restored in conformity with the laws and regulations under which they were originally established. Extinct lines or corners must be restored to the exact locality they originally occupied, if possible. Resort should first be had to the marks in the field. The surveyor should first seek to identify the missing corner on the ground, by the aid of the bearing trees or witness mounds, line trees, etc., described in the original field notes. When two or more witness trees or mounds can be found, they afford the best means for restoring a missing corner to its original position that can be had. If the corner cannot be identified in this manner, clear and unquestionable testimony as to the locality it originally occupied should be taken, if such testimony be obtainable. This testimony must be had from the lips of old settlers,

residents of the neighborhood, who may be able to point out from their personal observation and recollection the position of a stake or mound set by the original surveyor at the time the line was run. Axmen, or chainmen, who were with the Government surveyor, may be sworn and their affidavits taken as to the original location of missing corners, and generally, as to their knowledge of the place where the Government surveyor located the line which the private surveyor is endeavoring to retrace. But this sort of evidence is always more or less unreliable, and subject to abuse; and, after all, the monuments placed on the ground by the Creator, which neither time nor man can efface or change—mountains, rivers, the ocean bluff, ponds and lakes, and other prominent features of the earth's surface—these, when they correspond with the field notes of the original survey, form the best evidence of the true location of the lines and corners established by the Government surveyor.

Section 454a.—PERPETUATING CORNERS.—The Legislature of 1905 passed a law making it the duty of County Surveyors to perpetuate so far as possible the corners established by the Government surveys. The law provides that when any County Surveyor shall find a Government corner marked in the original survey by placing charcoal in the ground, or by a wooden stake, earth mound, or other perishable monument, it shall be his duty to remark said corner by placing therein a monument of heavily galvanized iron pipe, or galvanized iron stake, not less than two inches in diameter and two feet long, or that he may use some other material not less in size and equally imperishable. All such monuments located in public highways must be placed with the top not less than twelve inches below the surface of the ground, but when not located in public highways they must be placed with the top six inches above the surface of the ground. If the top of the monument is placed above the ground, it must not be less than four feet long, if of metal. The surveyor

must note witness objects that are within a reasonable distance of any corner, and state distance and course from the corner, and record his notes in the County Recorder's office. The County Recorder is required to keep a book for the purpose, properly indexed, which shall be a public record. Boards of Supervisors are required to furnish all necessary pipes or stakes for such monuments, on demand, at the county's expense. (Act of the Legislature, approved March 18, 1905.)

Section 455.—PROPORTIONATE MEASUREMENTS.—In retracing lines, it frequently happens that the measurements do not agree with those stated in the Government field notes. This discrepancy generally arises from a difference in the length of the respective chains used, or a want of proper care in straightening and leveling the chain, or in sticking the pins, on the part of one set of chainmen or the other, but is sometimes owing to an error in tallying committed by the Government chainman. When these differences in measurement occur, the County Surveyor must in all cases establish his corners at intervals proportionate to those given in the Government field notes. This rule must be observed even if the original interval be one or more tallies too many or too few.

Section 456.—INSTRUCTIONS FROM THE GENERAL LAND OFFICE.—The Department of the Interior, through the General Land Office, has from time to time issued circular letters of instruction, stating the rules established by law which must be followed by County Surveyors and others in retracing the lines of Government surveys and relocating missing corners. From these letters of instruction the following rules have been copied, and are recommended to the careful study of the owners of land the boundaries of which are in controversy:—

(1) All corners of the public surveys established by the Government surveyors must stand as the true corners they

were intended to represent, and the length of lines stated in the field notes of the original survey must be considered as the true lengths thereof.

(2) Missing corners should be restored to the exact position they originally occupied.

(3) All lines subdividing a Section must be straight lines running through the Section from the corner in one boundary to its corresponding corner in the opposite boundary of said Section.

(4) Section and quarter Section corners as established by the Government survey, must, by law of Congress, stand as the true corners.

(5) Missing corners must be reestablished at the identical point where the original posts were planted by the United States Deputy Surveyors.

(6) The legal presumption is, in the absence of any evidence to the contrary, that lost Section and quarter Section posts were originally established at the distance indicated in the field notes.

(7) Half quarter Section corners must be established equidistant from the Section and quarter Section posts.

(8) To divide a Section into quarters, a right line should be run from the quarter Section post in one Section line to the corresponding quarter Section post in the opposite Section line, even though one or more of these posts may have been established nearer to one Section corner than the other, thereby giving to one quarter Section more than 160 acres, and to another less than 160 acres.

(9) It is the duty of the surveyor to reestablish missing posts in the exact locality where they were originally placed in the Government survey. The proof of locality first sought to be obtained should be the witness trees, or any other means of identification contained in the field notes, and next, clear and unquestionable testimony of any kind. If no bearing trees, or other evidence in the field notes or elsewhere, exist, by which the locality of the missing posts can be identified or determined in the field,

then the legal presumption is that the missing Section or quarter Section corners were originally established in conformity with the distances expressed in the field notes, and the surveyor should so reestablish them.

(10) Extinct quarter Section corners, except on fractional Section lines, when they cannot be identified, should be reestablished equidistant between the Section corners, in a right line between the nearest noted "line trees" each side of it, if there are any; but if none are found, then in a right line between the Section corners. Extinct quarter Section posts, on Section lines which close on the North and West boundaries of Townships, should be reestablished, according to the original measurement thereof, at 40 chains from the last interior Section corner.

(11) Extinct Section corners may be reestablished by running a right line between the nearest noted "line tree" North and South and East and West of the lost corner, if there be any such trees within the distance of the nearest quarter Section corners; but if no "line tree" be found, then between the nearest quarter Section or Section corners, and at the point of intersection of the two lines thus run, establish the Section corner, with new bearings to the nearest and most desirable objects.

(12) The quarter mile posts are not established in Government surveys, but are, by law, understood to be equidistant from the Section and quarter Section corners, and should be so established by the County Surveyor.

(13) It may be remarked, that where the measurement of any Section line by the County Surveyor does not correspond with the original measurement recorded in the field notes, lost corners should be reestablished at proportionate distances from each other between the known corners.

Section 457.—MANUAL OF UNITED STATES SURVEYING.—If any reader of this book desires to acquire more extensive information of the system of United States

surveying, and of the rules of the General Land Office regulating the retracing of Government lines and the relocating of lost or missing corners, he is recommended to obtain a copy of the "Manual of United States Surveying," by J. H. Hawes, published by J. B. Lippincott Company, Philadelphia. It is a clear and comprehensive treatment of the subject, giving very full and useful information upon all matters connected with surveying.

Section 458.—WHERE SURVEYOR SHOULD START.—To retrace a line, a surveyor should start from some known corner called for by the field notes of the original survey. He should start from the nearest known corner. When he has found such a corner, and has identified it by descriptions in the field notes, or by the testimony of old residents in the neighborhood, it will make no difference whether the corner is on the Township line, or in a Township north or south of the line; for if it is a corner established by the original surveyor, when locating the Township line, or subsequently in subdividing a Township, and is the nearest known corner to the point which the private surveyor is endeavoring to retrace or relocate, it should be his starting point in making his survey.

Section 459.—MONUMENTS CONTROL COURSES AND DISTANCES.—It is a rule of surveying, always to be applied to the retracing of Government lines and the relocating of Government corners, that monuments, natural or artificial, control courses and distances. Consequently, whether the courses and distances correspond with the field notes or not, if the monuments called for by the field notes are found on the ground, they must control. It is only where no monuments, natural or artificial, can be found, that the courses and distances will control.

Section 460.—COMPLETION OF UNITED STATES SURVEY.—The Government survey of the public lands is made by running and marking the lines of the

Township and Sections, and by marking the corners of the Township, Sections, and quarter Sections. It is not necessary that a whole Township be surveyed at one time, and often different parts of a Township are surveyed at different times. But no survey of any part is complete until the lines and corners about that part are run and established as required by the statute. Even after a principal meridian and base line have been established, and the exterior lines of the Township have been surveyed, neither the Sections nor their subdivisions can be said to have any existence until the Township is subdivided into Sections and quarter Sections by an approved survey. The lines are not ascertained by the survey, but they are created by it.

Section 461.—APPLICATION TO PURCHASE SCHOOL LAND.—The law of California does not contemplate a sale of school land by the State until the title to the 16th and 36th Sections has vested in the State, and the title to these Sections does not vest in the State until the plat of the survey is approved by the United States Surveyor-General. An application to purchase a 16th or 36th Section of land, filed before the plat of the survey of the Township is approved by the United States Surveyor-General, is unauthorized and void.

Spaulding's Table for Measurement of Logs

Section 461a.—LEGAL STANDARD OF LOG MEASUREMENT.—The State has by law adopted the table known as Spaulding's Table for the Measurement of Logs, as the legal standard of measurement in California. The law passed by the Legislature (Statutes of 1878) reads as follows: "There shall be but one standard for the measurement of logs throughout the State. The following table, known as Spaulding's Table for the Measurement of Logs, is hereby made the standard and table for the measurement of logs throughout the State. For the measurement of logs

of any greater length than indicated in the table set forth in Section 2 of this Act, the computation shall be made in accordance with table. All logs shall be measured at the small end and inside the bark, and the contents computed according to table. Allowance shall be made for rot, shake, or other defect in logs measured by this scale and under the provisions of this Act, so as to make the survey express the actual quantity of merchantable lumber in each log."

The Spaulding Table for the Measurement of Logs is as follows:—

Length in feet.	Diam. 10	Diam. 11	Diam. 12	Diam. 13	Diam. 14	Diam. 15	Diam. 16	Diam. 17	Diam. 18	Diam. 19	Diam. 20
12....	38	47	58	71	86	103	121	141	162	184	207
13....	41	51	62	76	93	111	131	152	175	199	224
14....	44	55	67	82	100	120	141	164	189	214	241
15....	47	59	72	88	107	128	151	176	202	230	258
16....	50	63	77	94	114	137	161	188	216	245	276
17....	53	67	82	100	121	145	171	199	229	260	293
18....	57	70	87	106	129	154	181	211	243	276	310
19....	60	74	91	112	136	163	191	223	256	291	327
20....	63	78	96	118	143	171	201	235	270	306	345
21....	66	82	101	124	150	180	211	246	283	322	362
22....	69	86	106	130	157	188	221	258	297	337	379
23....	72	90	111	136	164	197	231	270	310	352	396
24....	76	94	116	142	172	206	242	282	324	368	414

Length in feet.	Diam. 21	Diam. 22	Diam. 23	Diam. 24	Diam. 25	Diam. 26	Diam. 27	Diam. 28	Diam. 29	Diam. 30	Diam. 31
12....	231	256	282	309	337	366	396	427	459	492	526
13....	250	277	305	334	365	396	429	462	497	533	569
14....	269	298	329	360	393	427	462	498	535	574	613
15....	288	320	352	387	421	457	495	533	573	615	657
16....	308	341	376	412	449	488	528	569	612	656	701
17....	327	362	399	437	477	518	561	604	650	697	745
18....	346	384	423	463	505	549	594	640	688	738	789
19....	365	405	446	489	533	579	627	676	726	779	832
20....	385	426	470	515	561	610	660	711	765	820	876
21....	404	448	493	540	589	640	693	747	803	861	920
22....	423	469	517	566	617	671	726	782	841	902	964
23....	442	490	540	591	645	701	759	818	879	943	1008
24....	462	512	564	618	674	732	792	854	918	984	1052

Length in feet.	Diam. 32	Diam. 33	Diam. 34	Diam. 35	Diam. 36	Diam. 37	Diam. 38	Diam. 39	Diam. 40	Diam. 41	Diam. 42
12....	561	597	634	673	713	755	798	843	889	936	984
13....	607	646	686	729	772	817	864	913	963	1014	1066
14....	654	696	739	785	831	880	931	983	1037	1092	1148
15....	701	746	792	841	891	943	997	1053	1111	1170	1230
16....	748	796	845	897	950	1006	1064	1124	1185	1248	1312
17....	794	845	898	953	1010	1069	1130	1194	1259	1326	1394
18....	841	895	951	1009	1069	1132	1197	1264	1333	1404	1476
19....	888	945	1003	1065	1128	1195	1263	1334	1407	1482	1558
20....	935	995	1056	1121	1188	1258	1330	1405	1481	1560	1640
21....	981	1044	1109	1177	1247	1321	1397	1475	1555	1638	1722
22....	1028	1094	1162	1233	1307	1384	1463	1545	1629	1716	1804
23....	1075	1144	1215	1289	1366	1447	1529	1615	1703	1794	1886
24....	1122	1194	1268	1346	1426	1510	1596	1686	1778	1872	1968

Length in feet.	Diam. 43	Diam. 44	Diam. 45	Diam. 46	Diam. 47	Diam. 48	Diam. 49	Diam. 50	Diam. 51	Diam. 52	Diam. 53
12....	1033	1086	1134	1186	1239	1293	1348	1404	1461	1519	1578
13....	1119	1176	1228	1284	1342	1400	1460	1521	1582	1645	1709
14....	1205	1267	1323	1383	1445	1508	1572	1638	1704	1772	1841
15....	1291	1357	1417	1482	1548	1616	1685	1755	1826	1898	1972
16....	1377	1448	1512	1581	1652	1724	1797	1872	1948	2025	2104
17....	1463	1538	1606	1680	1755	1831	1909	1989	2069	2151	2235
18....	1549	1629	1701	1779	1858	1939	2022	2106	2191	2278	2367
19....	1635	1719	1795	1877	1961	2047	2134	2223	2313	2405	2498
20....	1721	1810	1890	1976	2065	2155	2246	2340	2435	2531	2630
21....	1807	1900	1984	2075	2168	2262	2385	2457	2556	2657	2761
22....	1893	1991	2079	2174	2271	2370	2470	2574	2678	2784	2893
23....	1979	2081	2173	2273	2374	2478	2582	2691	2800	2911	3024
24....	2066	2172	2268	2372	2478	2586	2696	2808	2922	3038	3156

Length in feet.	Diam. 54	Diam. 55	Diam. 56	Diam. 57	Diam. 58	Diam. 59	Diam. 60	Diam. 61	Diam. 62	Diam. 63	Diam. 64
12....	1638	1700	1763	1827	1893	1960	2028	2098	2169	2241	2315
13....	1774	1841	1909	1979	2050	2123	2197	2272	2349	2427	2507
14....	1911	1983	2056	2131	2208	2286	2366	2447	2530	2614	2700
15....	2047	2125	2203	2283	2366	2450	2535	2622	2711	2801	2893
16....	2184	2266	2350	2436	2524	2613	2704	2797	2892	2988	3086
17....	2320	2408	2497	2588	2681	2776	2873	2972	3072	3174	3279
18....	2457	2550	2644	2740	2839	2940	3042	3147	3253	3361	3472
19....	2593	2691	2791	2892	2997	3103	3211	3321	3434	3548	3665
20....	2730	2833	2938	3045	3155	3266	3380	3496	3615	3735	3858
21....	2866	2974	3085	3197	3312	3429	3549	3671	3795	3921	4051
22....	3003	3116	3232	3349	3470	3592	3718	3846	3976	4108	4244
23....	3139	3258	3379	3501	3628	3756	3887	4021	4157	4295	4437
24....	3276	3400	3526	3654	3786	3920	4056	4196	4338	4482	4630

Length in feet.	Diam. 65	Diam. 66	Diam. 67	Diam. 68	Diam. 69	Diam. 70	Diam. 71	Diam. 72	Diam. 73	Diam. 74	Diam. 75
12....	2390	2467	2545	2625	2706	2789	2874	2960	3047	3135	3224
13....	2589	2672	2757	2843	2931	3021	3113	3206	3301	3396	3492
14....	2789	2878	2969	3062	3157	3253	3353	3453	3555	3657	3761
15....	2987	3083	3181	3281	3382	3486	3592	3700	3809	3919	4030
16....	3186	3289	3393	3500	3608	3718	3832	3946	4062	4180	4298
17....	3385	3494	3605	3718	3833	3951	4071	4193	4316	4441	4567
18....	3585	3700	3817	3937	4059	4183	4311	4440	4570	4702	4836
19....	3784	3906	4029	4156	4284	4415	4550	4686	4824	4964	5104
20....	3983	4111	4241	4375	4510	4648	4790	4933	5078	5225	5372
21....	4182	4316	4453	4593	4735	4880	5029	5180	....	....	....
22....	4381	4522	4665	4812	4961	5113	5269	5426	....	....	....
23....	4580	4728	4877	5031	5186	5345	5508	5673	....	....	....
24....	4780	4934	5090	5250	5412	5578	5748	5920	....	....	....

Length in feet.	Diam. 76	Diam. 77	Diam. 78	Diam. 79	Diam. 80	Diam. 81	Diam. 82	Diam. 83	Diam. 84	Diam. 85	Diam 86
12....	3314	3405	3497	3590	3684	3779	3874	3970	4067	4165	4264
13....	3590	3688	3788	3889	3991	4094	4196	4301	4406	4512	4619
14....	3866	3972	4080	4188	4298	4408	4519	4631	4745	4859	4974
15....	4142	4256	4371	4487	4605	4723	4842	4962	5084	5206	5330
16....	4418	4540	4663	4786	4912	5038	5165	5293	5423	5553	5685
17....	4694	4823	4954	5085	5219	5353	5488	5624	5762	5900	6040
18....	4970	5107	5245	5385	5526	5668	5811	5955	6101	6247	6396
19....	5246	5391	5537	5684	5833	5983	6133	6282	6440	6594	6751
20....	5522	5675	5829	5983	6140	6298	6456	6616	6778	6941	7106

Length in feet.	Diam. 87	Diam. 88	Diam. 89	Diam. 90	Diam. 91	Diam. 92	Diam. 93	Diam. 94	Diam. 95	Diam. 96
12.....	4364	4465	4566	4668	4771	4875	4980	5085	5192	5300
13.....	4727	4837	4946	5057	5168	5281	5395	5508	5624	5741
14.....	5091	5209	5327	5446	5566	5687	5810	5932	6057	6183
15.....	5455	5581	5707	5835	5964	6094	6225	6356	6490	6625
16.....	5818	5953	6088	6224	6361	6500	6640	6780	6922	7066
17.....	6182	6325	6468	6613	6759	6906	7055	7203	7355	7508
18.....	6546	6697	6849	7002	7156	7312	7470	7627	7788	7950
19.....	6909	7069	7229	7391	7554	7791	7885	8051	8220	8391.
20.....	7273	7441	7610	7780	7951	8125	8300	8475	8653	8833

Section 461b.—EXPLANATION OF TABLE.—The length of any log in feet will be found in the left-hand column of the table, and the diameter at the top of the page.

To find the number of feet of square-edged boards which a log will produce when sawed: Take the length of feet in left-hand column of the table, and its diameter in inches at the top of the page; trace the two columns of figures until they meet, and you have the required amount.

(A log which is 18 feet long and 21 inches in diameter gives at the right of the length, and directly under the diameter, 346 feet; and one 23 feet long and 18 inches in diameter, gives 310 feet.)

Logs longer than are given in this table can be easily measured by doubling any given length; for example, to find the number of feet, board measure, contained in a log 28 feet long by 19 inches in diameter, double the amount contained in a log 14 feet long, 19 inches in diameter, and you have the answer—428 feet. For a log 42 feet long, 19 inches diameter, multiply the amount contained in the table in a log 14 feet long by 3, and you have the amount; and so on to any length or size.

Each size log has been scaled so as to make all that can be practically sawed out of it, if economically sawed, each log to be measured at the top or small end, inside of the bark, and, if not round, to be measured two ways, at right angles, and the difference taken for the diameter. Where there are any known defects the amount deducted should be agreed upon by the buyer and seller, and no fraction of an inch to be taken into the measurement.

Sections Omitted

Sections 462 to 551, inclusive.—(Sections 462 to 551, inclusive, of former editions, are omitted from the Eighth Edition; and other subjects of greater value and more general interest have been added. The subject here omitted was "Division Fences.")

Sections 552 to 595, inclusive.—(Sections 552 to 595, inclusive, of former editions, are omitted from the Eighth Edition; and other subjects of greater value and more general interest have been added. The subject here omitted was "Rights and Liabilities of Professional Men.")

Searchers of Records

Section 596.—ABSTRACTS OF TITLE.—An abstract of title is a condensed history of the title to the land, consisting of a synopsis or summary of the material portions of all the conveyances of record, of whatever kind or nature, which in any manner affect the land, or any estate or interest in the land, together with a statement of all liens, charges, or liabilities to which the property may be subject, and of which it is in any way material for purchasers to be apprised. The object of the abstract is to enable the purchaser, or his attorney, to pass more readily on the sufficiency of the title. Therefore, a complete abstract should show whatever appears of record which concerns the sources of the title and its present condition. The descent and line of the title should be clearly traced out, and all encumbrances and liens of every sort, and all adverse claims, and the material parts of all patents, deeds, wills, judicial proceedings, and other records or documents which touch the title.

Section 597.—SEARCHERS OF RECORD.—From the necessity of having an abstract of record of the title to land, and the volume and extent of the records themselves, has grown that class of expert searchers known as abstracters, or searchers of record, whose business it is to prepare in a condensed and convenient form the data from which it can be determined whether the title is good or bad, or free from encumbrance, and if encumbered at all, the character of the encumbrance. So important is their work, and so much depends upon the accuracy and fidelity of the abstracts they furnish, that it is to be expected by

those who engage in the business of furnishing abstracts that any errors or omissions resulting in damages will incur a liability on their part to their patrons.

Section 598.—LIABILITY OF SEARCHERS OF RECORD.—One who holds himself out to the world as an examiner of titles, and who undertakes to furnish correct abstracts of title, is bound to exercise skill and care in making the examination, and in preparing the abstract, and is liable in damages for a failure to exercise that duty. Persons engaged in the business of making abstracts of title occupy a relation of confidence towards those employing them, which is second only in the sacredness of its nature to the relation which a lawyer sustains to his client. Searchers of record consult the evidences of ownership, and become familiar with the chains and histories of title. They handle private title papers, and become aware of whatever weaknesses or defects may exist in the legal proceedings through which the ownership of real property is secured. And the courts have said, that they should be held to a strict responsibility in the exercise of the trust and confidence which are necessarily reposed in them.

Section 599.—TO WHOM LIABLE.—The liability of a searcher of records for want of skill or ordinary care and diligence is only to the party employing him. An action for damages for errors or omissions in an abstract of title cannot be sustained by a third person acting upon the faith of the correctness of the abstract, as there is no contract between him and the abstracter. The abstracter knows that his records are to be seen, and titles to be made in reliance upon them, but he is not bound to know that his certificate is for the use or reliance of any but the person who receives it, nor can it be assumed that he gives it for any other use. He contracts with the person who requests and pays for it, to give a certificate which shall state the facts; but he enters into no relation of

contract or duty in respect to it with any other person; and, if another relies upon it to his injury, he cannot recover damages against the abstracter, because the latter assumed no duty for his protection. A searcher of records is liable for his negligence only to the person who requests and pays for the certificate of search. He is not liable to the grantee of the person who employed him, as there was no contract between them. A searcher of records, employed by the owner to prepare an abstract of title for the purpose of procuring a loan, is not liable in damages to the lender, for a loss caused by a mistake in the abstract, there being no contract between him and the lender. It is a general rule that a searcher of records is liable for damages, because of his negligence or mistake, only to his immediate employer, and not to the latter's assigns, vendees, or devisees, nor to any third person between whom and himself there is no contract relation.

Section 600.—LIABILITY FOR MISTAKE.—A searcher of records, giving a certificate of title, is liable to his employer for any mistake arising from want of due care or diligence, or from ignorance of his business.

Section 601.—LIABILITY FOR OMITTING ENCUMBRANCE.—If a searcher of records undertakes to furnish a purchaser of land with a full abstract of title, he is liable in damages for his negligence in carelessly omitting from the abstract any mention of a particular encumbrance, by which the purchaser is put to additional expense to perfect his title.

Section 602.—MARGINAL REFERENCE IN RECORD BOOK.—When a searcher of records undertakes to make a complete abstract of title, he takes the obligation upon himself to make a full and true search and examination of all the records relating to the land, and to note in the abstract accurately every transfer, conveyance, or other

instrument of record in any way affecting the title. He is not required to give any opinion as to the legal effect of any of the instruments, and just how full a description of them he shall give is, to a certain extent, a matter for himself to decide; but in so far as he assumes to describe the recorded instruments, he is required to make his descriptions accurate. The record, and not a marginal reference to it by the Recorder, nor an index reference to the instrument, is what determines the character and legal effect of the instrument; and the duty of the searcher of records is not fulfilled by merely assuming the accuracy of a marginal reference, without examining the instrument itself. In failing to examine the record of the instrument itself, the searcher is guilty of negligence. So, in a case where a partial release of a mortgage was recorded, and a register of deeds, in his reference to it on the margin of the record of the mortgage erroneously made the entry "Satisfied" (with a reference to the book and page where the release was recorded), when in fact it should have been "Partially satisfied," and the searcher, in making up the abstract, relied upon this marginal entry entirely, supposing it to be correct, and did not examine the contents of the instrument of release itself, and the party procuring the abstract was afterwards compelled to pay the mortgage; it was held by the court that the searcher was guilty of negligence, and was liable for whatever the party had been compelled to pay.

Section 603.—OMITTING JUDGMENT AND SALE. —If a searcher of records, employed by a purchaser to make an abstract, omits to note the fact of a judgment and sale of the land for taxes, of which the purchaser is ignorant until the time for redemption has expired, whereby he is caused to pay out money to remove the cloud from his title, the abstracter is liable in damages to the purchaser for the sum paid out by him.

Section 604.—INCORRECT REPORT OF QUANTITY OF LAND CONVEYED.—If a searcher of records incorrectly reports in the abstract the quantity of land previously conveyed, he is liable in damages to the person who employed him and relied upon the information in purchasing the land.

Section 605.—MEASURE OF DAMAGES.—The damages suffered must be actual damages. The law will not compel a searcher of records, even though he has been guilty of inexcusable negligence or ignorance, in preparing the abstract, to pay any damages by way of punishment. The person who employed him is entitled to the actual money loss, by reason of the negligent act or omission, and that is all.

Section 606.—WHEN SUIT FOR DAMAGES MUST BE COMMENCED.—In California, a suit against a searcher of records for damages must be commenced within two years after the delivery of the defective abstract, or it is barred by the statute of limitations.

Section 607.—SALE OF GOOD WILL OF ABSTRACTING BUSINESS.—Section 1674 of the Civil Code of California, providing that one who sells the good will of a "business" may agree with the buyer to refrain from carrying on a similar "business," is broad enough to include, and does include, the business of abstracting.

Notary Public

Section 608.—DUTIES OF NOTARY.—The duties of a Notary Public are prescribed by law, and are varied and important. In business affairs, the taking of acknowledgments to deeds, mortgages, leases, and other instruments, constitutes the greater and most important part of a Notary's work. His duties, however, extend to a number of other matters. He is required, when requested, to

demand acceptance and payment of foreign, domestic, and inland bills of exchange, or promissory notes, and protest the same for non-acceptance and non-payment; he may take acknowledgment or proof of powers of attorneys, mortgages, deeds, grants, transfers, and other instruments of writing executed by any person; he may take depositions and affidavits, and administer oaths, to be used before any court, judge, officer, or board in this State. He is required to keep a record of all official acts done by him; to keep a record of the parties to every instrument acknowledged or proved before him, with the date and character of the instrument; and when requested, and upon payment of his fees, he must make and give a certified copy of any record in his office.

Section 609.—BOND OF NOTARY.—Every Notary in California must give an official bond in the sum of $5,000, which must be approved by the Judge of the Superior Court, of his county, and recorded as other official bonds of county officers.

Section 610.—LIABILITY OF NOTARY.—The law provides that for the official misconduct or neglect of a Notary Public, he and the sureties on his official bond are liable to the parties injured for all the damages sustained.

Political Code, Section 801.

Section 611.—WHAT ACTS COVERED BY OFFICIAL BOND.—The condition of the bond of a Notary Public being, that he will "well and truly perform and discharge the duties of a Notary Public according to law," this embraces every act which he is authorized or required by law to do in virtue of his office. By accepting the office, a Notary contracts with those who employ him that he will perform the duties of the office with integrity, diligence, and skill. He gives his bond to indemnify those who shall suffer by the unfaithful or unskilful performance

of his duty. Before a Notary and his bondsmen can be held liable for damages, it is necessary to determine whether the act done or not done was or not authorized by law, was or not incumbent upon him, was or not required of him, whether he was directed to do it, whether he has failed to discharge the duty, and whether injury has been sustained. Where a Notary does a thing which the law does not authorize him to do, although he does it in his capacity of Notary Public, his bondsmen are not responsible for his act. Notaries and their sureties are liable only to the persons who have employed the Notary, and are only liable to those who suffer injury on account of the Notary's failure to perform the duty incumbent upon him or required by law.

Section 612.—**LIABILITY OF SURETIES ON OFFICIAL BOND.**—The surety on a Notary's official bond is only bound for such acts of his as the law authorizes or requires him to do in his official capacity. By signing the bond, the surety tells all who may need the services of a Notary: "You can go with security to this Notary; I assure you that he is a competent officer; that he will well and faithfully discharge and perform all the duties imposed upon him by law; and if he fails in doing so, I will be responsible to you for losses sustained." If, therefore, a person calls on a Notary for the performance of a duty incumbent upon him, and the Notary fails or neglects his duty, and injury is suffered, the surety is liable to the party injured. A surety cannot be held liable because the Notary has done acts which the law did not authorize or compel him to perform, and which were therefore not incumbent upon him. The sureties upon the official bond of a Notary Public are only liable for damages occasioned by his negligence or misconduct in the line of his official duty.

Section 613.—**PREMATURE PROTEST OF PROMISSORY NOTE.**—In case of a promissory note falling

due, according to its face, upon Sunday, a Notary cannot present it for payment, nor make protest, on the preceding Saturday. The following Monday is the proper date for presentment and protest, unless that is also a legal holiday, when the next would be the proper day. Sunday, not being a legal day for exacting payment, cannot be computed, except when it is an intermediate day. To do so would make another contract for the parties, and by requiring payment on Saturday would compel the obligation to be met before the contract time for its performance had arrived. The act of a Notary in wrongfully protesting a promissory note before it is due gives a right of action against him for damages, and against his bondsmen, in favor of the injured party. For the Notary is presumed to know the wrongful character of the act, and that, in the trading community, the protest of a note is likely to impair the maker's credit. If lawfully protested, the maker cannot complain; but he can complain, and justly so, if presentment and protest are made prematurely, before the law authorizes the acts.

Section 614.—**FALSE CERTIFICATE TO ACKNOWLEDGMENT.**—The sureties on the official bond of a Notary are liable for the full amount of a mortgage purchased in reliance on the genuineness of the Notary's certificate of acknowledgment, where the certificate is in fact false and the mortgage a forgery, and where the purported maker was solvent and able to pay the mortgage debt. When a Notary certifies that the mortgagor duly acknowledged the execution of a mortgage, which in fact is a forgery, the measure of damages, in a suit against the Notary or his sureties, brought by one who has parted with value on the face of such certificate, is the amount which would be the value of the mortgage if genuine. The value of the mortgage depends not merely upon the value of the mortgaged property, but also on the solvency of the mortgagor. When it appears, in such a suit for damages,

that the plaintiff, had the mortgage been genuine, would have been able to collect the whole amount named therein, he is entitled to recover that amount from the Notary or his sureties, without regard to the value of the mortgaged property or the interest of the mortgagor in the property. If it should appear that the mortgage, if valid, could not be collected and would not be worth anything, then the plaintiff would not be entitled to damages, because it would not be shown that he had suffered any injury. But whatever value was shown, if the mortgage were valid, could be recovered against the Notary and his sureties.

Section 615.—NOTARY CANNOT AMEND CERTIFICATE.—When an acknowledgment has been made, before a Notary, the party making it has done all that the law requires to make the instrument his act and deed. The embodiment of the fact of acknowledgment, in the form of the certificate prescribed by law, devolves upon the Notary, and not upon the party making it. And if the Notary blunders in certifying to an acknowledgment duly made, or if he makes a defective or false certificate, he cannot alter or amend it; because, after taking the acknowledgment and delivering the return, his functions cease, and he is discharged from all further authority. The Superior Court, and not the Notary, has power to correct a defective certificate of acknowledgment.

Section 616.—NOTARY'S KNOWLEDGE OF PARTY ACKNOWLEDGING INSTRUMENT.—A Notary is bound to know the person acknowledging an instrument before him, or, if he is not personally acquainted with him, he is bound to have the person's identity established by competent proof. If he knows the person, he may so state in his certificate of acknowledgment; if he does not know him personally, he may state in his certificate of acknowledgment the proof presented to establish his identity. When a Notary Public, in taking and certifying

an acknowledgment to a mortgage, neglected to state in his certificate that the party acknowledging the instrument was known to him, or was identified by the testimony of a witness examined by him for that purpose, the Supreme Court of California held that the Notary was guilty of gross negligence, and that he and his bondsmen were responsible to the party injured for the damages resulting from his negligence. The Court said: "Plaintiff loaned to one Dupuy a sum of money, taking as security a mortgage on a lot in San Francisco. The mortgage was acknowledged by Dupuy before defendant Finlay, who was a Notary Public. The mortgage used was an ordinary printed form, having a certificate of acknowledgment in blank, in which was inserted, in the hand of one Sanders, who acted in the transaction as attorney for both mortgagor and mortgagee, the name of the mortgagor and the date of the acknowledgment. To this certificate the Notary affixed his signature and seal, but omitted to state either that the party acknowledging was known to him, or was identified by the testimony of a witness examined for that purpose. In consequence of this omission, the record of the mortgage was held not to impart notice to subsequent encumbrancers. Plaintiff's lien was postponed in favor of a later mortgage, which exhausted the entire property, and Dupuy being insolvent, the debt was lost. Plaintiff now seeks to recover, on the bond of the Notary, the damages suffered by the negligent and unskilful performance of an official act. The purpose of a certificate of acknowledgment is to entitle the deed to be recorded, and to be admitted in evidence without further proof. The certificate furnished was utterly worthless for either purpose. This neglect is not excused by the fact that the certificate had been partially filled by the attorney for the grantee. The certificate, upon its face, is unfinished; the date and the name of the grantor had been inserted, leaving it for the Notary to insert his knowledge or the evidence received of the identity of the party making the

acknowledgment. If the Notary read the certificate before signing it, this omission must have been known to him; if he did not, he is equally guilty of negligence, for an officer who affixes his official signature and seal to a document, without examining it to find whether the facts certified are true, can scarcely be said to faithfully perform his duty according to law." (Decided by the Supreme Court of California in the case of Fogarty vs. Finlay, which decision is printed in Volume 10 of the California Reports, page 239.)

Section 617.—PARTY INTRODUCED TO NOTARY. —The acknowledgment of an instrument must not be taken, unless the Notary taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument. A Notary has no right, in disregard of this plain provision of the law, to certify that he knows a person whom he does not know, on the mere introduction of a third party; and if he does so, and a loss results, he renders himself and his sureties liable to make good the loss.

Civil Code, Section 1185.

Section 618.—MISAPPROPRIATION OF MONEYS. —As it is no part of the official duty of a Notary to receive money from or for anybody, his sureties are not liable for money fraudulently obtained and retained by him. So, if a Notary Public, who is also a real estate agent and engaged in negotiating loans, by false representations procures money upon forged mortgages, and then retains the money, his sureties are not liable. The sureties upon an official bond are not sureties for the general good behavior of the officer. They are responsible only for his official misconduct or neglect. As stated, it is no part of the duty of a Notary Public to receive money from or for anybody. It is misconduct, but not official misconduct, for a Notary

to fraudulently obtain money in the manner stated. He does not receive any money in his official capacity. The sureties on his official bond are not liable for such misconduct, because it is only against his official misconduct that the sureties consent to indemnify persons injured by him.

Section 619.—FEES OF NOTARY.—The fees of Notaries allowed by law are as follows: For drawing and copying every protest for non-payment of a promissory note, or for the non-payment or non-acceptance of a bill of exchange, draft, or check, two dollars; for drawing and serving every notice of non-payment of a promissory note, or of the non-payment or non-acceptance of a bill of exchange, order, draft, or check, one dollar; for recording every protest, one dollar; for drawing an affidavit, deposition, or any paper other than those above mentioned, for each folio, thirty cents; for taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first two signatures, one dollar each, and for each additional signature, fifty cents; for administering an oath or affirmation, fifty cents; for every certificate, to include writing it, and the seal, one dollar.

Political Code, Section 798.

Carriers of Freight

Section 620.—FREIGHT AND FREIGHTAGE.—Property carried is called freight; the compensation to be paid for its carriage is called freightage; the person who delivers the freight to the carrier is called the consignor; and the person to whom it is to be delivered is called the consignee.

Section 621.—CARE AND DILIGENCE REQUIRED OF CARRIERS.—A carrier of property for compensation

must use at least ordinary care and diligence in the performance of all his duties.

Section 622.—DIRECTIONS TO CARRIERS.—When the directions of a consignor and consignee are conflicting, the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he must comply with the directions of the consignee. But the consignor may give special directions to the carrier to receive no orders of any kind from the consignee inconsistent with his own.

Civil Code, Section 2116.

Section 623.—DELIVERY OF FREIGHT.—A carrier of freight must deliver it to the consignee, at the place to which it is addressed, in the manner usual at that place. If there is no usage to the contrary at the place of delivery, freight must be delivered as follows: (1) If carried upon a railway owned or managed by the carrier, it may be delivered at the station nearest to the place to which it is addressed; (2) If carried by sea from a foreign country, it may be delivered at the wharf where the ship moors, within a reasonable distance from the place of address; or if there is no wharf, on board a lighter alongside the ship; or, (3) In other cases, it must be delivered to the consignee or his agent, personally, if either can, with reasonable diligence, be found.

Civil Code, Section 2119.

Section 624.—OBLIGATIONS OF CARRIER WHEN FREIGHT NOT DELIVERED.—If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the freight in safety, upon his responsibility as a warehouseman, until the consignee has had a reasonable time to remove it. If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest

post-office. If the consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him.

Civil Code, Sections 2120, 2121.

Section 625.—BILL OF LADING.—A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a special person at a special place. All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee in good faith and for value, in the ordinary course of business. A bill of lading represents the property for which it has been given, and by its indorsement or by delivery without indorsement the property in the goods may be transferred, when such is the intent with which the indorsement or delivery is made. By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill, by one having an interest in or a right to control the property, is equivalent to a delivery of the property itself. A consignor may effectuate a sale or pledge of the property consigned by delivery of the bill of lading to the purchaser or pledgee, as completely as if the property were in fact delivered. Bills of lading are choses in action, and instruments of this character may be transferred for a valuable consideration by delivery only. The indorsee for value of a bill of lading which has been delivered to him may bring an action in his own name for the goods. And generally in all cases where the shipper having the right of property indorses and delivers the bill of lading, the

indorsee may maintain an action for the goods represented by such bill of lading in his own name. A person purchasing a draft drawn by the shipper of the goods, with a bill of lading accompanying it, has a special property in the goods covered by the bill of lading; and usually in the case of a time draft this special property vests in the purchaser of the draft as security for its acceptance. It may be, if so agreed between the shipper and the purchaser of the draft, that the purchaser will have a right to retain the bill of lading, and thus retain his special property in the goods shipped, not only for the acceptance but for the payment of the draft. When a bill of lading is made to the "bearer," or in equivalent terms, a simple transfer, by delivery, conveys the same title as an indorsement.

Civil Code, Sections 2126, 2127, 2128.

Section 626.—NUMBER OF BILLS OF LADING.—A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading, of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so, the consignor may take the freight from him, and recover from him, besides, all damages he sustains.

Civil Code, Section 2130.

Section 627.—CARRIER EXONERATED BY DELIVERY.—A carrier is exonerated from liability for freight by delivering it in good faith, to any holder of a bill of lading, properly indorsed, or made in favor of the bearer. When a carrier has given a bill of lading, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight.

Civil Code, Sections 2131, 2132.

Section 628.—WHEN FREIGHT MUST BE PAID.—A carrier may require his freightage to be paid upon his receiving the freight; but if he does not demand it then,

he cannot do so until he is ready to deliver the freight to the consignee. The carrier may demand payment in advance, subject to a liability to refund it if not earned.

Civil Code, Section 2136.

(a)—Carrier's Lien.—A carrier has a lien for freightage and for services rendered at request of shipper or consignee in and about the transportation, care and preservation of the property, and he also has a lien for money advanced at request of shipper or consignee to discharge a prior lien.

Act of the Legislature, approved April 19, 1909.

Section 629.—WHO MUST PAY FREIGHT.—The consignor of freight is presumed to be liable for the freightage; but if the contract between him and the carrier provides that the consignee shall pay it, and the carrier allows the consignee to take the freight, he cannot afterward collect the freightage from the consignor. The consignee of freight is liable for the freightage, if he accepts the freight with notice of the intention of the consignor that he should pay it. If a part of the freight is accepted by a consignee, without a specific objection that the remainder is not delivered, the freightage must nevertheless be apportioned and paid as to that part. If a consignee voluntarily receives freight at a place short of the one agreed upon for delivery, the carrier is entitled to a just proportion of the freightage, according to the distance. If the carrier, being ready and willing, offers to carry the freight to the destination originally intended, he is entitled to the full freightage.

Civil Code, Sections 2137, 2138, 2139, 2141, 2142.

Section 630.—FREIGHT CARRIED FARTHER THAN AGREED.—If freight is carried beyond the destination agreed upon by the parties, the carrier is not entitled to any additional compensation.

Civil Code, Section 2143.

Section 631.—OBLIGATION TO ACCEPT FREIGHT.—It is a general rule that a common carrier must, if able to do so, accept and carry whatever freight is offered. The freight must be offered at a reasonable time and place, and be of a kind that the common carrier undertakes or is accustomed to carry. For if the freight offered is not of the kind which the carrier has undertaken to carry, or if it be a dangerous shipment, another rule may prevail. A common carrier is not bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk; nor dangerous articles, such as nitroglycerine, dynamite, gunpowder, aquafortis, oil of vitriol, matches, etc. It is optional with the carrier to accept such freight; it may accept or reject it, when offered; and when accepted at all, the carrier may insist upon such limitations of its liability as it sees fit. A common carrier may not relieve itself from any liability imposed upon it by law under the dictates of public policy; but, on the other hand, upon any question of private right, or the right of private property, it may lessen the degree of responsibility which attaches to it as an insurer, by any contract not in itself unreasonable. Thus, the shipping receipt may lawfully exempt the carrier from liability from loss by fire, where inflammable or combustible articles of freight are offered for carriage.

Section 632.—AGREEMENTS TO LIMIT LIABILITY.—The obligations of a common carrier can only be limited by special agreement. General notice by the carrier is not sufficient, and a special contract with each shipper is required by the law. But a common carrier cannot be exonerated, even by special contract, from its liability for the gross negligence, fraud, or wilful wrongs of itself or servants. A consignor or consignee, by accepting a bill of lading, or written contract for carriage, with knowledge of its terms, assents to the rate of hire, and the time, place, and manner of delivery therein stated; and

also to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes is lost or injured, when the value of the property is not named; and also to the limitation stated therein to the carrier's liability for loss or injury to live animals carried. But his assent to any other modification of the carrier's obligations contained in such instrument can be manifested only by his signature to the same.

Civil Code, Section 2176.

Section 633.—GENERAL LIABILITY OF COMMON CARRIERS FOR LOSS.—Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable for loss or injury of the property from any cause whatever, except: (1) An inherent defect, vice, or weakness, or a spontaneous action, of the property itself; (2) The act of a public enemy of the United States, or of this State; (3) The act of the law; or (4) Any irresistible superhuman cause. The first exception, inherent defects, includes decay of fruits, the diminution, leakage, or evaporation of liquids, and the spontaneous combustion of goods. In all these cases, where the negligence of the carrier does not cooperate in the loss, he will be excused. Live animals are also included in this exception, to whatever extent they injure themselves or one another, impelled by their inherent vices and propensities. A public enemy, the second exception, is one with whom the Nation or State is at open war, and pirates on the high seas, who are universally treated as the enemies of all mankind. By the act of the law, stated as the third exception, is meant the contingency of goods attached, or taken under execution, or other legal process. By the fourth exception, an irresistible superhuman cause, is meant some act of God, as where freight is destroyed by lightning, or volcanic eruption, or other cause over which human agency could have no control.

Civil Code, Section 2194.

Section 633a. — LOSSES NOT WAIVED BY CONTRACT.—A common carrier cannot limit itself from liability in case of gross negligence, fraud, or willful wrong. The excusable results flowing from the acts of God are those only which cannot be prevented by the interposition of human agency. In a suit against a railroad company for the freezing of potatoes while en route, this was held not to be a loss for which the company could claim immunity, under the limitation of liability clause in its contract with the shipper. Any movable object can be kept from freezing, and the freezing of any such articles cannot be excused as being an act of God. (Decided by the California District Court of Appeals in the case of Wood, Curtiss & Company vs. the Missouri Pacific Railway Company, which decision is printed in Volume II of California Appellate Decisions, No. 88, page 419.)

Section 634.—LIABILITY FOR DELAY.—A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence.

Civil Code, Section 2196.

Section 635.—SHIPMENT OF GOLD, PRECIOUS STONES, STATUARY, PICTURES, GLASS OR CHINAWARE.—A common carrier of gold, silver, platina, or precious stones, or of imitations thereof, in a manufactured or unmanufactured state; of timepieces of any description; of negotiable paper or other valuable writings; of pictures, glass, or chinaware; of statuary, silk, or laces; or of plated ware of any kind, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon the receipt thereof, by mark upon the package or otherwise, of the nature of the freight; nor is such carrier liable upon any package carried for more than the value of the articles named in the receipt or the bill of lading.

Civil Code, Section 2200.

Section 636.—ACCEPTING FREIGHT FOR PLACE BEYOND USUAL ROUTE.—If a common carrier accepts freight for a place beyond its usual route, it must, unless otherwise agreed, deliver the freight at the end of its route in that direction to some other common carrier carrying to the place of address, or connected with those who thus carry; and its liability ceases upon making such delivery. If freight addressed to a place beyond the usual route of the common carrier who first receives it is lost or injured, the carrier must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while the freight was in its charge, or it will be liable for the loss.

Civil Code, Sections 2201, 2202.

Section 636a.—RAILROADS MUST FURNISH CARS.—Whenever cars are wanted, the shipper may apply in writing to the superintendent or agent of a railroad company, indicating the point where the cars are to be sent, and how many are desired. The railroad company must furnish the cars, if the application be for 10 cars or less in 5 days; if the application be for 10 and less than 50 cars, they must be furnished in 10 days; if the application be for 50 cars or more, they must be furnished in 15 days. If the application be for cars to carry perishable freight, the number of cars applied for must be furnished within 48 hours. The time will begin to run from the hour of seven o'clock A. M. of the next day following the day when the application for cars is received by the railroad company. The application for cars must state the number of cars desired, the kind of freight to be shipped, the point of destination, and the time and place at which they are desired. When cars are applied for, if they are not furnished, the railroad company becomes liable and immediately indebted to the party who applied, for the sum of five dollars per day for each car failed to be furnished, and in addition all actual damages the applicant may have sustained. When a person applies for cars, the

railroad company has the right to demand a deposit of one-fourth of the amount of the freight charge. The cars, when furnished, must be loaded within forty-eight hours; and if not loaded within that time, six dollars per day must be paid the company for each car not used, besides the actual damage sustained by the company. The consignee must unload cars within forty-eight hours after delivery to him, and if he fails to do so he will be liable to the company in the sum of six dollars per day. The liability of either party is excused when failure to furnish, load, or unload cars, is caused by public calamity, strikes, washouts, acts of God, the public enemy, mobs, riots, wrecks, fires or accidents.

Act of the Legislature, approved April 20, 1909.

Letters of Credit

Section 637.—WHAT IS A LETTER OF CREDIT.—A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.

Section 638.—HOW ADDRESSED.—A letter of credit may be addressed to several persons in succession.

Section 639.—LETTERS GENERAL OR SPECIAL.—A letter of credit is either general or special. When the request for credit in a letter is addressed to specified persons, by name or description, the letter is special. All other letters of credit are general. A letter of credit addressed to a particular person is limited to him, for the writer must be deemed to have granted it in reliance on his prudence and discretion in acting upon it. A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by so doing, it becomes, as to him, of the same effect as though addressed to him by name. Several persons may successively give credit upon a general letter.

Section 640.—LIABILITY OF THE WRITER.—The writer of a letter of credit is, upon the default of the debtor, liable to those who gave credit in compliance with its terms. By giving the letter, the writer obliges himself to accept such bills or orders as may be drawn under it in good faith, and within the limits of the credit specified in the letter.

Section 641.—LETTER OF CREDIT MAY BE A CONTINUING GUARANTY.—If the parties to a letter of credit appear by its terms to contemplate a course of future dealing between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor, but it is to be deemed a continuing guaranty.

Section 642.—WHEN NOTICE TO THE WRITER NECESSARY.—A letter of credit must by its terms express or imply the necessity of giving notice, or no notice of credit obtained upon it will be necessary. The writer of a letter of credit is liable for credit given upon it without notice to him, unless it can be seen from the letter itself that notice to the writer was intended by the parties. Unless there is something in the nature of the contract or terms of the letter making acceptance or notice necessary as a condition of liability, neither is necessary to bind the writer.

Section 643.—CREDIT GIVEN MUST AGREE WITH TERMS OF LETTER.—The law of California provides, that if a letter of credit prescribes the persons by whom or the mode in which the credit is to be given, or the term of credit, or limits the amount, the writer is not bound except for transactions, which, in these respects, conform strictly to the terms of the letter.

Civil Code, Sections 2858, 2859, 2861, 2862, 2864, 2865.

Section 644.—INTENTION OF PARTIES.—In cases where doubt arises as to the real meaning of a letter of credit, the rule of law is that the terms of the letter will be liberally and reasonably construed. The intention of the parties is the essential thing to be ascertained. But words of doubtful meaning, or technical terms, or local expressions, used in a letter of credit, cannot be taken advantage of to defeat the liability of one who signs and gives such a letter. True, it is a general rule, that the surety or guarantor should not be held beyond the precise stipulations of his contract, and he has a right to insist upon the exact performance of any condition inserted in the letter. But when the question is as to the meaning which shall be given to the terms used in the instrument, the law will always be found liberal and reasonable; for letters of credit are commercial instruments, generally drawn up by merchants in brief language, and often loose in their structure and aim; and to give the words of a letter of credit a nice and technical construction, would not only defeat the intention of the parties in many instances, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. Therefore, it is well to remember, that while parties will be held by the law to the terms of their contract, yet the law will not allow a person who advances money on the faith of a letter of credit, however loosely drawn, to suffer loss by any strained or technical construction of the language or directions contained in it.

Bills of Exchange

Section 645.—NATURE OF BILLS OF EXCHANGE.—A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, requests another, called the drawee, to pay a specified sum of money. A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

Section 646.—BILL IN PARTS OF A SET.—A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set. An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it. Presentment, acceptance, or payment, of a single part in a set of a bill of exchange, is sufficient for the whole.

Civil Code, Sections 3171, 3172, 3173, 3174, 3175.

Section 647.—WHERE BILL OF EXCHANGE IS PAYABLE.—A bill of exchange is payable: (1) At the place where, by its terms, it is made payable; or, (2) If it specify no place of payment, then at the place to which it is addressed; or, (3) If it be not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found. If the drawee has no place of business, or if his place of business or residence cannot with reasonable diligence be ascertained, presentment for payment is excused, and the bill may be protested for non-payment.

Civil Code, Section 3176.

Section 648.—WHEN BILL OF EXCHANGE MAY BE PRESENTED FOR ACCEPTANCE.—A bill of exchange may be presented by the holder to the drawee for acceptance, at any time before it is payable, and if acceptance is refused, the bill is dishonored. When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused.

Section 649.—HOW PRESENTMENT MUST BE MADE.—Presentment of a bill of exchange for acceptance must be made in the following manner, as nearly as by

reasonable diligence is practicable: (1) The bill must be presented by the holder or his agent; (2) It must be presented on a business day, and within reasonable hours; (3) It must be presented to the drawee, or, if he be absent from his place of residence or business, to some person having charge thereof, or employed therein; and the drawee, on such presentment, may postpone his acceptance or refusal until the next day. If the drawee have no place of business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, presentment for acceptance is excused, and the bill may be protested for non-acceptance. Presentment for acceptance to one of several joint drawers, and refusal by him, dispenses with presentment to the others. A bill of exchange which specifies a drawee in case of need must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

Civil Code, Section 3186.

Section 650.—ACCEPTANCE MUST BE IN WRITING.—An acceptance of a bill of exchange must be made in writing, by the drawee or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words. The holder of a bill of exchange, if entitled to an acceptance, may treat the bill as dishonored if the drawee refuses to write across its face an unqualified acceptance.

Section 651.—WHAT MAY BE TREATED AS SUFFICIENT ACCEPTANCE.—The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance: (1) An acceptance written upon any part of the bill, or upon a separate paper; (2) An acceptance qualified so far only as to make the bill payable at a particular place within the city or town in which, if the acceptance was unqualified, it would be payable; or, (3) A refusal by the drawee to

return the bill to the holder after presentment, in which case the bill is payable immediately, without regard to its terms. The acceptance of a bill of exchange by a separate instrument binds the acceptor to one who, upon the faith thereof, has taken it for value. An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance, in favor of every person who upon the faith thereof has taken the bill for value or other good consideration.

Civil Code, Sections 3195, 3197.

Section 652.—WHEN ACCEPTANCE MAY BE CANCELED.—The acceptor of a bill of exchange may cancel his acceptance at any time before the delivery of the bill to the holder, and before the holder has, with the consent of the acceptor, transferred his title to another person for value upon the faith of such acceptance.

Civil Code, Section 3198.

Section 653.—WHAT IS ADMITTED BY ACCEPTANCE.—The acceptance of a bill of exchange admits the signature of the drawer, but does not admit the signature of any indorser to be genuine.

Section 654.—ACCEPTANCE OR PAYMENT FOR HONOR.—On the dishonor of a bill of exchange by the drawee, or, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party to it. The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor. The person accepting or paying for honor must write a memorandum upon the bill, stating for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence of the fact that he has accepted or paid the bill. Having done so, he is entitled to reimbursement from the parties for whom he pays, and from all parties prior to

them. A bill of exchange which has been accepted for honor must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an indorser; after which the acceptor for honor must pay the bill. The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.

Civil Code, Sections 3203, 3204, 3205, 3206, 3207.

Section 655.—PRESENTMENT FOR PAYMENT.—If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment. A bill of exchange, accepted payable at a particular place, must be presented at that place for payment, when presentment for payment is necessary, and need not be presented elsewhere. If a bill of exchange, payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused. The circumstances which will excuse delay are such as occur through floods, or storms, or war, or pestilence, or famine, rendering travel or communication impossible. Mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party to it. There are certain other things which will also excuse both presentment and notice. The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it; if, for instance, the drawee, at the time when presentment should be made, is insane, his capacity to make any contract is gone, and the law will not require presentment to him under such circumstances. Presentment of a bill of exchange for acceptance or payment, and also notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept or the acceptor to pay the bill; or if, at

the time of drawing, he had no reason to believe that the drawee would accept or pay it.

Civil Code, Sections 3211, 3212, 3213, 3214, 3218, 3220.

Section 656.—FOREIGN BILLS.—A bill of exchange drawn and payable within the State is an inland bill. All others are called foreign bills of exchange.

Section 657.—PROTEST OF FOREIGN BILL OF EXCHANGE.—Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest. Protest must be made by a Notary Public, if with reasonable diligence one can be obtained; and if not, then by any reputable person, in the presence of two witnesses.

Protest must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and, finally, protesting against all the parties to be charged.

A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance, and a protest for non-payment in the city or town in which it is presented for payment.

A protest must be noted on the day of presentment, or on the next business day; but it may be written out at any time thereafter.

The want of a protest of a foreign bill of exchange, or delay in making the same, is excused in like cases with the want or delay of presentment.

Notice of protest may be given by the Notary who makes the protest, and served as follows: (1) By delivering it to the party to be charged, personally, at any place; or, (2)

By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or, (3) By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.

If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party to it, in like manner as of an inland bill; but if any indorser expressly requires protest to be made, by a direction written on the bill at or before his indorsement, protest must be made, and notice of protest must be given to him and to all subsequent indorsers.

One who pays a foreign bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.

Civil Code, Sections 3227, 3228, 3229, 3230, 3233.

Section 658.—DAMAGES ALLOWED ON DISHONOR OF BILL OF EXCHANGE.—Damages are allowed, as a full compensation, for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this State, and protested for non-acceptance or non-payment. The rate of damages allowed by the law of California, on dishonor of a foreign bill of exchange, is as follows: (1) If drawn upon any person in this State, two dollars upon each one hundred dollars of the principal sum specified in the bill; (2) If drawn upon any person out of this State, but in any of the other States west of the Rocky Mountains, five dollars upon each hundred dollars of the principal sum specified in the bill; (3) If drawn upon any person in any of the United States east of the Rocky Mountains, ten dollars

upon each hundred dollars of the principal sum specified in the bill; (4) If drawn upon any person in any place in a foreign country, fifteen dollars upon each hundred dollars of the principal sum specified in the bill.

From the time of notice of dishonor and demand of payment, lawful interest is allowed upon the aggregate amount of the principal sum specified in the bill, and the damages mentioned in the preceding paragraph.

If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange.

If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

Bank Checks

Section 658a.—NATURE OF BANK CHECKS.—In its essential features a bank check has been sometimes likened to a bill of exchange, but it is evident that there are very material differences between them. A bill of exchange must be presented for acceptance, and again for payment. A check is an order to pay the holder a sum of money at a bank, on the presentation of the check and demand of the money; and no further notice is necessary, no acceptance is required or expected. It is well said that one radical difference between a check and a bill of exchange is, that the former need not be accepted, while the latter must be, in order to fix the liability on the drawee. It is requisite to a check that it be drawn on a bank or banker, and that it be payable on demand.

Section 658b.—DELIVERY OF CHECK.—It is necessary that there should be delivery of a check before the payee can acquire any rights in it. The same rule applies

to a check which applies to a note or to a bill of exchange. It is not valid unless it has been delivered to the payee.

Section 658c.—NEGOTIABILITY.—A check is a negotiable instrument, when payable to "bearer," or to the "order" of a person.

Section 658d.—POSSESSION OF CHECK.—The mere possession of a check will not justify a bank in making payment to the person in possession, without some identification, or some evidence of genuineness of the indorsement, if an indorsement is in question.

Section 658e.—DRAWING ON ANTICIPATED FUNDS.—A depositor in a bank has a right to draw his check in the reasonable expectation that he will have sufficient funds, at the time of presentment, to meet it. Hence, insufficiency of funds, at the time the check is drawn, does not affect the holder's right to payment, if there are sufficient funds on hand when the check is presented.

Section 658f.—CERTIFIED CHECK.—The certification of a check, when made before delivery, operates in favor of third parties simply as an assurance that it is genuine, and will be paid. The bank certifying it becomes bound. Beyond this, nothing is added to the legal force or effect of the check. A bank, by certification of a check, becomes entitled to charge the amount thereof to the account of the drawer at the time of certification, thus appropriating to the payment of the check the necessary amount of money from the funds on deposit to the credit of the drawer. By certification of a check the bank enters into an absolute undertaking to pay it when presented, within the period of limitation of actions.

Section 658g.—PRESENTMENT AND DEMAND FOR PAYMENT.—A person who takes a check does so with the legal obligation to present it at the bank for payment,

within reasonable time. A check is not designed for circulation, but for immediate presentment for payment, and if not thus presented within a reasonable time according to the circumstances, the indorsers will be released from liability on it. A check must be presented for payment with all the dispatch and diligence consistent with the transactions of commercial concerns.

Section 658h.—STOPPING PAYMENT.—The drawer of a check may stop payment, by notifying the bank on which it is drawn that payment is stopped and giving instruction not to pay it. In such case, it is the duty of the bank to refuse payment, and give its reasons for so doing, leaving the drawer and the holder to settle the difficulty between them. But there are circumstances where payment cannot be stopped. Payment can only be stopped where the check remains in the hands of the original holder. So, where the original holder has indorsed the check to another, who received it in good faith and for value, payment cannot be stopped. And where the check has been certified, it cannot be countermanded by the drawer, because it has passed beyond his control. A check cannot be countermanded by the drawer after it has been presented at the bank for payment.

Section 658i.—PAYMENT OF CHECK BY MISTAKE.—A bank is bound to know the state of its depositor's account; and if it makes a mistake in this respect it must abide the consequences. Banks are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual depositor, and they take and pay checks at their own risk and peril. If, from negligence or inattention to its own affairs, a bank improvidently pays when the account of a customer is not in condition to warrant it, or if, by mistake, a check is paid when the drawer has no funds in bank, it must look to the customer for rectification or repayment, and not to the party to whom the check was paid.

Section 658j.—RIGHTS AND LIABILITIES OF INDORSERS.—The rights and liabilities of indorsers are the same as to all negotiable instruments. Checks, bills of exchange, and promissory notes, with respect to indorsers, are considered according to the same rule. For the law as to indorsers, their rights and liabilities, see the subject of "Promissory Notes," where the subject is fully treated.

Section 658k.—REFUSAL TO PAY.—A check being payable immediately and on demand, the holder can only present it for payment, and the bank can fulfill its duty to the depositor only by paying the amount demanded. The holder has no right to demand from the bank anything but payment of the check, and the bank has no right as against the drawer, to do anything but pay it. If the bank refuses to pay the check, when there are funds sufficient on deposit, the holder has recourse against the maker and the indorsers, and the maker, in turn, has a right to sue the bank.

Section 658 l.—LIABILITY OF BANK TO DEPOSITOR FOR REFUSAL TO PAY CHECKS.—Where there is money on deposit in a bank, sufficient to pay checks drawn by the depositor, and the bank refuses to pay the checks, the liability of the bank is only for the money deposited and interest from the date of refusal to pay. The bank is not liable in damages for loss of credit, or sacrifice of goods, or expenses of litigation, or other injuries sustained.

Smiths' Cash Store, of San Francisco, sued the First National Bank of San Francisco for $100,000 damages, the plaintiff alleging that it deposited with the bank on a certain date the sum of $4,000, and drew checks against this deposit aggregating $3,679.55, which the bank failed and refused to pay; and that plaintiff was injured and damaged in its credit, was compelled to sell goods at a sacrifice, had to make an assignment of property, and was compelled to pay out large sums in litigation; all by reason of the bank's refusal to pay the checks. The Supreme Court decided against the plaintiff, on the ground that it was not entitled

to damages at all, and that it could only recover the money deposited. The decision says: "It is well settled here that the relation between a general depositor and the bank in which his deposit is made is simply that of debtor and creditor. The moneys deposited immediately become the property of the bank, and the latter becomes the debtor of the depositor for the amount of the deposit. The original and every subsequent deposit by the customer is in strict legal effect a loan by the customer to the bank, and every payment by the bank to or on account of the customer is a repayment of the loans to that extent. Wherefore it follows that the customer can never hold or charge the bank as a trustee, quasi trustee, factor, or agent. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it, or deal with it as the property of his principal; but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands." The defendant in this case was not liable in damages for a conversion of plaintiff's money to its own use; for the money deposited by plaintiff became, by such deposit, the property of defendant, and the latter could not convert its own money. (Decided by the Supreme Court of the State of California, in the case of Smiths' Cash Store vs. First National Bank of San Francisco, which decision is printed in Volume 31 of California Decisions, No. 1686, page 307.)

Section 658m.—FORGED CHECKS.—If a bank pays a forged check, whether the forgery be in the amount of the check, or in the signature, it cannot deduct the amount so paid from the depositor's account. A bank is bound to know the handwriting and the signature of its depositors,

and it takes all the risk of paying a check which is a forgery. If it does pay a forged check it will have to stand the loss.

It is the duty of the depositor to promptly notify the bank of the discovery of a forged check, and negligence on the part of the depositor in this respect may be used by the bank as a defense, if sued for money which it has paid out on forged checks. Where a bank balances a depositor's pass book, containing a debit against him for a payment made on a forged check, and returns the book to him at the same time, this constitutes a statement of his account, making it his duty to examine it within a reasonable time, and to return it to the bank without unreasonable delay, with notice of his objections to it. Where, in any case, the depositor gives notice to the bank of the forgery as soon as possible after detecting it, and without unreasonable delay in the examination of his accounts, the forgery of his check is wholly inoperative, and gives no rights to the bank which pays it; on the contrary, the depositor, if the bank insists on debiting his account with the amount paid out on a forged check, can sue the bank and recover the money from it.

Section 658n. — FORGED INDORSEMENTS. — The drawer of a check is not presumed to know the signature of the payee. The bank must at its peril determine the genuineness of the signature of indorsers. When, therefore, a bank returns to its depositor a check, as evidence of a payment made by his direction, he has the right to assume that the bank has ascertained the indorsement upon it to be genuine. A bank is bound to satisfy itself of the genuineness of indorsements on a check made payable to a certain person or order, and must alone bear the responsibility of determining that question.

Section 658 o. — GARNISHMENT OF MONEY ON DEPOSIT.—A check is not an assignment of the funds upon which it is drawn, and there is no obligation of a bank to the holder of a check of a depositor until the check

is presented for payment. The delivery of a check does not operate as an assignment of the funds drawn upon; and where the funds are garnished as those of the drawer, before the check is presented for payment, the garnishment will hold. An ordinary uncertified check upon a general bank account is neither a legal nor an equitable assignment of any part of the sum standing to the credit of the depositor, and confers no right upon the payee which he can enforce against the bank. A check is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. Therefore, any attaching creditor of the depositor will hold the funds, by serving a garnishment upon the bank before a check given another for the money deposited has been presented for payment at the bank. (Decided by the Supreme Court in the case of Donohoe-Kelly Banking Company vs. Southern Pacific Company, which decision is printed in Volume 25, No. 1350, California Decisions, page 60.)

Section 658p.—LIABILITY OF BANK FOR PAYMENT OF CHECK AFTER DEATH OF DRAWER.—The delivery of a check, with instructions not to present it for payment until after the death of the drawer, does not operate as an assignment of the funds drawn upon, and is not valid as a gift; and where the bank pays the check after the drawer's death, an action will lie against the bank to recover the money for the estate of the decedent. (Decided by the Supreme Court in the case of Pullen vs. Placer County Bank, which decision is printed in Volume 25, No. 1349, California Decisions, page 51.)

Section 658q.—DRAWING CHECK WITH INTENT TO DEFRAUD.—Every person who, wilfully, with intent to defraud, draws or delivers to another person any check or draft, on a bank, knowing at the time that he has not sufficient funds in or credit with the bank to meet such draft or check in full upon its presentation, is guilty of

a felony. The punishment is fixed at not less than one nor more than fourteen years in the State Prison.

Act of the Legislature, approved March 19, 1907.

Assignment for Benefit of Creditors

Section 659.—ASSIGNMENT BY INSOLVENT DEBTOR.—An insolvent debtor may in good faith execute an assignment of his property in trust for the benefit of his creditors and the satisfaction of their claims. Every assignment must be in writing, and must contain a list of the names of the creditors of the assignor, and their places of residence and amounts of their respective demands, and the amounts and nature of any security therefor, and must be made to the Sheriff of the county, or city and county, wherein the assignor resides, if the assignor resides within this State; or in case the assignor resides out of this State, then to the Sheriff of the county, or city and county, wherein the property assigned, or some of it, is situated: but when the assignor resides out of the State, an assignment may, by its terms, transfer any property of the assignor in this State. The Sheriff must take possession of all the property so assigned to him. When the assignment has been made, the Sheriff must immediately, by mail notify the creditors named in the assignment, at their places of business or residence as given therein, to meet at his office on a day and hour to be appointed by him, of not less than eight or more than ten days from the date of the delivery of the assignment to him, for the purpose of electing one or more assignees, as they may determine, in the place and stead of the Sheriff, and must also publish a notice of such meeting, and the purpose thereof, at least once before such meeting, in some newspaper published in his county, or city and county. The notice so to be mailed must also contain a statement of the amount of the demand of the creditor, and the amount and nature of any security therefor, as set forth in the assignment; and if any creditor shall not find the amount of his claim to be correctly so stated,

he may file with the Sheriff, at or before such meeting, a statement, under oath, of his demand, and such statement shall, for the purpose of voting, be accepted by the Sheriff as correct; and when no such statement is filed, the statement of amount as set forth in the assignment must be accepted by the Sheriff as correct. No creditor having a mortgage or pledge of real or personal property of the debtor, or lien thereon, for securing the payment of a debt owing to him from the debtor, shall be allowed to vote any part of his claim at such meeting of creditors, unless he shall have first conveyed, released, or delivered up his security to the Sheriff, for the benefit of all creditors of the assignor. At such meeting, the Sheriff must preside, and a majority in amount of demands present or represented by proxy must control all questions and decisions. The creditors may adjourn the meeting from time to time, and may vote on all questions, either in person, or by proxy signed and acknowledged before any officer authorized to take acknowledgments, and filed with the Sheriff. At the meeting, the creditors may elect one or more assignees from their own number, in the place and stead of the Sheriff, and the person or persons so elected shall afterward be the assignee or assignees; and the Sheriff, by transfer in writing, must at once assign to such elected assignee or assignees all the property so assigned to him, and deliver possession thereof. The Sheriff, before the delivery of the assignment, must be paid the expenses incurred by him, and fees in such amount as would by law be collectible if the property assigned had been levied upon and safely kept under attachment. Thereupon such elected assignee or assignees shall take, and hold, and dispose of all such property and its proceeds, for the benefit of the creditors of the debtor.

Civil Code, Section 3449.

Section 660.—WHAT IS INSOLVENCY.—A debtor is insolvent, within the meaning of the law, when he is unable to pay his debts from his own means, as they become due.

But a person, although insolvent, is not prevented by the law from transferring, and may lawfully transfer property in this State to a particular creditor or creditors, for the purpose of paying or securing a debt due, provided the transfer is made in good faith.

Section 661.—VOID ASSIGNMENT.—An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in the following cases: (1) If it give a preference of one debt or class of debts over another; (2) If it tend to coerce any creditor to release or compromise his demand; (3) If it provide for the payment of any claim known to the assignor to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due from the assignor; (4) If it reserve any interest in the assigned property, or in any part thereof, to the assignor, or for his benefit, before all his existing debts are paid; (5) If it confer upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust; (6) If it exempt him from liability for neglect of duty or misconduct.

Civil Code, Section 3457.

Section 662.—INVENTORY TO BE MADE BY DEBTOR.—Within twenty days after making an assignment for the benefit of his creditors, the debtor must make and file, in the office of the County Recorder of the county in which he resided at the date of the assignment, a full and true inventory showing: (1) All the creditors of the assignor; (2) The place of residence of each creditor, if known to the assignor; or, if not known, that fact must be stated; (3) The sum owing to each creditor, and the nature of each debt or liability, whether arising on written security, account, or otherwise; (4) The true consideration of the liability in each case, and the place where it arose; (5) Every existing judgment, mortgage, or other security for the payment of any debt or liability of the assignor;

(6) All property of the assignor at the date of the assignment, which is exempt by law from execution; and, (7) All of the assignor's property at the date of the assignment, both real and personal, of every kind, not so exempt, and the encumbrances existing thereon, and all vouchers and securities thereto, and the value of such property according to the best knowledge of the assignor.

The inventory must be sworn to by the assignor.

Civil Code, Section 3461.

Section 663.—FAILURE TO FILE INVENTORY.—A failure on the part of a debtor to make and file the inventory mentioned in the last Section does not render the assignment void. The law provides that if the debtor fails in his duty to file the inventory, the assignees may make and file for record a verified inventory of all assets received by them; and the court, on petition of the assignee, will compel the debtor to appear and be examined relative to all matters embraced in the assignment, and will also compel him to bring with him into court all his books, vouchers, and papers relating to the assigned property. The court will then have power to order the surrender of the books, papers, and vouchers to the assignee, to be retained by him until his trust is fully completed and performed.

Section 664.—EFFECT OF FAILURE TO RECORD ASSIGNMENT.—An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and encumbrancers in good faith and for value, unless it is recorded, and unless either the inventory required of the assignor, or the inventory required of the assignee or assignees, is filed in the manner provided by law.

Civil Code, Section 3465.

Section 665.—BOND OF ASSIGNEE.—No bond is given by the Sheriff, but he is liable on his official bond

for the care and custody of the property while in his possession. Within forty days after the date of the transfer by the Sheriff, the assignee must enter into a bond, in such amount as may be fixed by a judge of the Superior Court of the county, or city and county, in which an inventory is filed, with sufficient sureties to be approved by such judge, and conditioned for the faithful discharge of the trust and the due accounting for all moneys received by the assignee, which bond must be filed in the same office with the inventory; and any assignee failing to give such bond may be removed by the Superior Court on petition of the assignor or any creditor, and his successor may be appointed by the court.

Civil Code, Section 3467.

Section 666.—ACCOUNTING BY ASSIGNEE.—After six months from the date of an assignment for the benefit of creditors, the assignee may be required, on the petition of any creditor, to account before the Superior Court of the county where the inventory was filed. The assignee's account, when rendered, must make a full and true showing of all his acts with relation to the property assigned to him.

Section 667.—PROPERTY EXEMPT FROM ASSIGNMENT.—Property exempt from execution, and insurance upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they shall pass thereby.

Civil Code, Section 3470.

Section 668.—COMPENSATION OF ASSIGNEE.—The assignee is entitled to a reasonable compensation for his services, and also to all necessary expenses incurred by him in the management of his trust.

Section 669.—ASSIGNEE PROTECTED FOR ACTS DONE IN GOOD FAITH.—The assignee is protected for

acts done in good faith, and will not be held liable for such acts if the assignment is afterward declared by a court to be void.

Section 670.—ASSIGNMENT NOT REVOCABLE.—An assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the Sheriff, or a transfer by the Sheriff to the elected assignee or assignees which has been executed and recorded, cannot afterward be modified or canceled by the parties without the consent of the assignor and of every creditor.

Civil Code, Section 3473.

Section 671.—CREDITORS' CLAIMS.—Notice to the creditors must be published by the assignee, and a copy mailed by him to each creditor, and the creditors must prove their claims; and after the expiration of thirty days from the first publication of the notice, the assignee may, in his discretion, declare and pay dividends to the creditors whose claims have been presented and allowed. No dividend already declared shall be disturbed by reason of claims being subsequently presented and allowed; but the creditor presenting such claim shall be entitled to a dividend equal to the per cent already declared and paid before any further dividend is made; provided, however, that there be assets sufficient for that purpose; and provided, that the failure to present such claim shall not have resulted from his own neglect, and the creditor shall attach to such claim a statement, under his oath, showing fully why it was not before presented.

Section 672.—CREDITOR HOLDING MORTGAGE OR PLEDGE.—When a creditor has a mortgage, or a pledge of personal property of the debtor, or a lien thereon as security for the payment of a debt due him from the debtor, and shall not have conveyed, released, or delivered

up such security to the Sheriff, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such mortgage, pledge, or lien, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the Superior Court of the county in which the assignment is made shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption on receiving such excess; or he may sell the property, subject to the claim of the creditor, and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor will not be allowed to prove any part of his debt.

PART II

COLLECTION OF BILLS AND ACCOUNTS

Section 673.—METHODS OF MAKING COLLECTIONS.—Custom will control to a great extent the methods of making collections in force in different localities, but whether collections be made monthly, quarterly, semi-annually, or annually, there are certain provisions of the law of the State which apply to all methods, and which must constantly be kept in mind. Whether a creditor collects his bills monthly, or at longer intervals of time, the law leaves to his own choice. The parties may contract for payment at any time or place, and the law will enforce the contract.

Section 674.—PRESENTMENT OF BILLS OR STATEMENTS OF ACCOUNT.—The debtor is entitled to have a bill or statement of account, showing the claim of his creditor. This is usual in every business, and it is more necessary in commercial affairs than in any other, for the book accounts of sales of merchandise, and other similar commercial transactions, are usually kept by the creditor alone.

Section 675.—ITEMIZED ACCOUNT.—When a bill has been presented which is not itemized, the debtor has a right to demand of the creditor an itemized account, showing in detail all the items of the claim presented to him.

Section 676.—OPEN AND CURRENT ACCOUNT.—An open account is an account where no balance has been struck. Until a balance is struck, even though there have been mutual dealings between the parties, the account is open and current.

Section 677.—WHEN OPEN ACCOUNT OUTLAWS.—An open account will outlaw in four years. That is, if there is a claim, for goods purchased, for instance, upon an open account, all items dating back more than four years will be outlawed, and in a suit for the amount of the bill the plaintiff cannot recover for any item more than four years old. So, in a suit for work or labor performed by the day or month, where there has not been a mutual account, no part can be collected except for the work done within four years.

Code of Civil Procedure, Section 337 (as amended by Legislature March 19, 1907).

Section 678.—MUTUAL ACCOUNT.—To constitute a mutual account there must be reciprocal demands. An account is mutual when each party makes charges against the other in his books for property sold, service performed, or money loaned or advanced. A payment on account will not make the account mutual. Mutual accounts are only where each party has a demand or right of action against the other. Thus, where a merchant sells a farmer goods, and the latter sells and delivers to the merchant, hay, grain, or a horse, or any other article of personal property, in the ordinary course of business, he has a demand against the merchant, and the merchant has a demand against him, and thus the account between them is a mutual account. In the course of mutual dealings between parties, the balance due may sometimes be on the one side and sometimes on the other, and in the ascertainment of the state of account, each may use his own demands as set off against that of the other until the less is exhausted by the greater. Where it appears, first, that the account between the parties consists of reciprocal demands; second, that the account is open; and third, that the account consists of different items of different dates; it is then said to be a mutual, open, and current account.

Section 679.—WHEN MUTUAL ACCOUNT OUTLAWS.—A suit may be brought on a mutual account at any time within four years from the date of the last item proved in the account on either side. When any item of a mutual account is within the four years, none of the account is outlawed, though some of the items may be more than four years old.

Code of Civil Procedure, Section 337 (as amended by Legislature March 19, 1907).

Section 680.—STATED ACCOUNT.—An account stated is where an account is balanced and rendered, and the person to whom it is rendered assents to it as being a correct statement of the balance due, and agrees to pay it. The stated account is usually in writing, but under certain circumstances it may be verbal. Where there is an open account, and the parties meet and agree orally before any portion of the account is outlawed upon the balance that is due, and there is an agreement to pay such balance, this will be good as an account stated. The assent to an account stated by the person to whom it is rendered may be expressly and directly given, or such assent may be inferred from circumstances. If the person receiving the statement makes no objection to it, and holds it for a long time apparently satisfied with it, his assent to it will be inferred.

Section 681.—WHEN STATED ACCOUNT OUTLAWS.—When the parties have stated and adjusted their accounts, and thus ascertained the balance, what was before an implied promise to pay what was reasonable, by such adjusting and stating of accounts, at once becomes an expressed promise to pay a sum certain. Therefore, in a suit to recover the amount due, the items of the original account are no longer referred to. The account is at an end, in fact. The parties have agreed upon a balance due, which one has promised to pay the other. The right to commence a suit for the amount due, upon a stated account,

runs four years after the time when the account was stated, and if suit is not commenced within four years, the debt will be outlawed.

Code of Civil Procedure, Section 337 (as amended by Legislature March 19, 1907).

Section 682.—INTEREST ON A STATED ACCOUNT.—The uniform custom of a merchant or manufacturer is presumed to be known to those who are in the habit of dealing with him, and in their dealings they are supposed to act with reference to that custom. When it is the universal custom of a merchant to charge interest after thirty days upon monthly balances due upon open accounts, and where such an account showing the interest charged up regularly is received by the debtor and fully understood by him, and where such account becomes stated, either by the prolonged failure of the debtor to object or by a settlement between the parties, the debtor is bound to pay the balance found due, including the interest charged.

Section 683.—ASSIGNMENT FOR COLLECTION.—An open account, a mutual account, or an account stated, may be assigned to a third person for collection. No money need be paid for the assignment. The consideration will be sufficient to sustain the assignment, if the person to whom the account is assigned undertakes on his part to make collection. If the assignee brings suit on the account, and the debtor makes the defense that there was no consideration for the assignment, it will be a sufficient answer to that defense to show that the account was assigned for collection.

Section 684.—ASSIGNEE MAY SUE IN HIS OWN NAME.—The assignee for collection may bring the suit in his own name. The law of California provides that every suit must be brought in the name of the real party in interest; but the assignee for collection must contribute his labor

and services, and his presumed undertaking and promise to do so is a sufficient consideration for the assignment to enable him to sue in his own name.

Section 685.—**ASSIGNMENT MAY BE VERBAL OR WRITTEN.**—The assignment of an account, open, mutual, or stated, may be made verbally or in writing. It is usual to make such assignments in writing, because this of itself affords documentary proof of the assignment; but a verbal assignment will be sufficient, where the proof is conclusive.

Section 686.—**ASSIGNMENT BY ONE PARTNER OF PARTNERSHIP ACCOUNT.**—One partner may make an assignment of a partnership account, in the name of the firm, and the assignment will be good. It is of no consequence to the debtor, as it in no respect affects his liability, whether the assignment was made at one time or another, or with or without consideration, or by one or by all the members of the firm. One member of a firm may even assign a partnership claim, in the name of the firm, to himself individually, and this will be sufficient to enable him to sue on it, if the other partners do not object. The other partners making no objections, the debtor will not be allowed to do so.

Section 687.—**COLLECTION OF ACCOUNTS WHEN BOOKS ARE LOST.**—Though the books in which the accounts were kept are lost, from whatever cause, by fire, or theft, or by being mislaid, yet the accounts can be collected, if they can be proved in some other way. First, the loss of the books of original entry must be shown, and diligent search to find them; then, the accounts may be proved by producing other books into which they were copied from the original entry book, or, if none such exist, by the verbal testimony of bookkeepers, agents, clerks, proprietors, or any one who may know what the accounts consisted of.

Section 688.—WHAT DEBTOR MAY SET OFF AGAINST ASSIGNED ACCOUNT.—When the assignee of an account sues to recover the amount due, the debtor may set off against the claim any claim which he had against the creditor himself at the time of the assignment, or before notice to him of the assignment. But his claim must be one upon which he could have maintained an independent action, and be one of contract; for he could not, in a suit against him upon an account, brought by either the creditor or his assignee, defend by setting up a demand for damages for a wrong suffered by him.

Code of Civil Procedure, Section 368.

Section 689.—AUTHORITY OF AGENT IN MAKING COLLECTIONS.—The authority of agents in making collections will be equal to the power actually or ostensibly delegated to them by the principal. If the debtor is informed by the creditor that a certain person or a bank is his agent to make collections, there can seldom be any danger in inferring full and extensive authority on the part of the agent to do everything necessary in and about the collection. But it often happens that the authority of the agent, and the extent of his powers, must be ascertained, not by any direct communication from the creditor, but from a long-continued course of dealing or custom of trade. If an agent for collection has been in the habit of collecting in a certain manner, or of making discounts upon certain accounts, or has collected regularly for the same firm or person at a particular place for a long time, these facts being known, it will be presumed that he has authority from his principal coextensive with his acts.

Section 690.—RATIFICATION OF AGENT'S ACTS.—Even though one who represents himself as an agent to make collections really has no such authority, the creditor for whom the collection is made may so conduct himself as to create a ratification of the agent's acts. Thus, if he

receives the proceeds from the agent, or knows of the manner of collection and makes no objection, or in any way leads the debtor to believe that he is satisfied with the agent's conduct, he will be deemed to have ratified the acts of the agent, and thus bind himself.

Section 691.—AGENT'S COMMISSIONS UPON COLLECTIONS.—The law leaves the agent's commissions upon collections made by him to be regulated by the agreement of the parties. But if a creditor sends a bill or account to an agent, with instructions to collect the same from the debtor, and the agent proceeds to make the collection, and nothing is said about the agent's compensation, there will be an implied obligation on the part of the creditor to pay the agent a reasonable commission. What is a reasonable commission will depend upon circumstances, taking into consideration the nature of the collection, the amount of labor and skill employed, and the amount usually paid, if there is any custom, for such collections in the particular locality or business.

Section 692.—COLLECTION OF BILLS AND ACCOUNTS WHEN DEBTOR IS DEAD.—When the debtor is dead, a claim upon the account must be presented to his Administrator or Executor, within four months from the first publication of notice to creditors, if the estate is appraised at less than $10,000, or within ten months from the first publication of notice to creditors, if the estate is appraised at $10,000 or over. The claim must be allowed and approved by the Administrator or Executor and the Judge of the Superior Court. If the claim is not allowed, the creditor can then sue the Administrator or Executor, as the case may be.

Section 693.—SUIT IN JUSTICE COURT ON BILLS AND ACCOUNTS.—A suit to collect the amount of a bill or account must be brought in the Justice Court, when the

amount is less than $300, exclusive of interest. In actions for the recovery of wages for labor performed, the Court must add, as part of the costs, an attorney's fee not exceeding twenty per cent of the amount recovered. This also applies to suits in the Superior Court.

Act of the Legislature, in effect April 28, 1907.

Section 694.—IN WHAT TOWNSHIP SUIT MUST BE BROUGHT.—If the money is to be paid at a certain place, then the suit may be brought in the township and county where the place of payment is situated. But if goods are sold in San Francisco to a person in Ukiah, and the bill is to be paid at Ukiah, then the creditor must sue in the Justice Court in Ukiah Township. If the bill is to be paid at San Francisco, the suit may be brought in the Justice Court there. If there is no agreement as to where the obligation to pay is to be performed, then the suit must be brought in the township and county where the debtor resides.

Section 695.—SUIT IN SUPERIOR COURT ON BILLS AND ACCOUNTS.—If the bill amounts to $300 or more, exclusive of interest, a suit to collect the amount due must be commenced in the Superior Court. However, the creditor may waive all the excess of his claim, and sue in the Justice Court for a sum less than $300, exclusive of interest, thus remitting to the debtor all of the account exceeding the amount sued for.

Section 696.—IN WHAT COUNTY SUIT IN SUPERIOR COURT MUST BE BROUGHT.—The same rule applies to suits in the Superior Court as obtains in the matter of Justice Court suits. That is, where there is no place agreed upon for the performance of the debtor's obligation to pay, the debtor has a right to have the suit tried in the Superior Court of the county where he resides; but if the bill is to be paid where the creditor resides, or at some other place, the suit may be tried there. The creditor

may bring his suit in the Superior Court of the county where he lives or has his place of business, in any event, and the suit will be tried there, unless the debtor appears and moves for the transfer of the case to the Superior Court of the county of his own residence.

Section 697.—ATTACHMENT OF DEBTOR'S PROPERTY IN SUIT TO COLLECT ACCOUNT.—What property of the debtor is the subject of attachment, to secure the collection of an account, in a suit by the creditor or his assignee, and what property is exempt from attachment and execution, will be found fully stated under the head of "Attachments and Executions."

Section 698.—MEANS FOR COLLECTION TO BE EMPLOYED BY AGENT.—Authority of an agent to collect implies and includes the right on his part to use all the ordinary means for collection, and among these are the employment of attorneys and the commencement of suits.

Section 699.—PAYMENT TO WIFE OF CREDITOR.—Where a man's wife is in the habit of transacting business for him, receiving and paying out money for him with his consent, payment to her of a debt due him in his presence, without objection from him, is a payment to him.

Section 700.—PAYMENT OF NOTE TO SUPPOSED AGENT.—A party who in good faith makes payments upon a promissory note to one whom he has reason to believe is the authorized agent of the holder thereof, and whose acts in receiving such payments have come to the knowledge of the holder, and have not been repudiated by him, cannot be held for the money so paid to the agent.

Section 701.—TAKING GOODS FOR CREDITORS' CLAIMS.—Where creditors, after receiving an offer of a bill of sale from their debtor, assign their claims to a

collecting agent for the purpose of conducting the transaction, with authority "to take the goods in full of the creditor's claims," the agent has authority to agree with the debtor that the sale shall be conditional, and that the goods will be surrendered to him, when enough is realized from the sales to satisfy the claim.

Section 702.—ACCEPTING PROMISSORY NOTE.—Under authority to settle with the debtor, and take anything he can get, an agent has power to accept a promissory note.

Section 703.—COLLECTION OF NOTES BY AGENT.—Authority given an agent to collect money, due on a note and mortgage, is not authority to the agent to accept a conveyance of the mortgaged premises in payment.

One who holds a note for collection cannot, without authority from the payee, agree to discharge one of the joint makers upon payment by him of a part of the sum due.

Although a mortgagee has authorized an agent to collect interest and to receive payment of the principal when due, the agency does not extend to receiving payment of principal before maturity.

The existence of an agent's authority to receive payment of notes may be inferred from the mutual conduct and relations of the parties, or from the general nature of the transactions in which they are concerned and the circumstances surrounding them.

PART III

NOTES AND MORTGAGES

Promissory Notes

Section 704.—WHAT IS A PROMISSORY NOTE.—The statute law of California defines a promissory note to be "an instrument negotiable in form, whereby the signer promises to pay a specified sum of money." But, while it is defined as an instrument "negotiable in form," it may be not negotiable, and still be a promissory note. And the law of the State, as well as the rules of commercial business, recognizes two classes of promissory notes, negotiable and non-negotiable. The difference between these two classes,—what constitutes a negotiable note, and what is meant by a non-negotiable note,—will be found stated further on, in other Sections.

Civil Code, Section 3244.

Section 705.—WHO MAY BE PARTIES.—All persons capable of entering into a contract may be parties to a promissory note, and be bound by it. And all persons in California are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights. A minor in California is a male under the age of 21 years, or a female under the age of 18 years. A minor under the age of 18 cannot make a contract relating to real property, or relating to any personal property not in his immediate possession or control; but he may make any other contract in the same manner as an adult, subject to certain conditions, stated in the next Section. A person of unsound mind, entirely without understanding, as an idiot or lunatic, has no power to make a contract of any kind; but a contract may be made by a person of unsound mind who

is not entirely without understanding, such a contract, however, being subject to be set aside in court. A person deprived of civil rights is not capable of making a contract while in that condition. A person is deprived of civil rights when he is sentenced to imprisonment in the State Prison for life, and his civil rights are suspended during the term when he is sentenced for a term less than life. A convict may, however, make and acknowledge a sale and conveyance of property.

Civil Code, Sections 33, 34, 38, 39, 1556; Penal Code, Sections 673, 674, 675.

Section 706.—NOTE MADE BY MINOR.—A minor may make a promissory note at any time before he comes of age. But, if he does make a promissory note while under the age of 18 years, he may disown and repudiate it, either before he comes of age or within a reasonable time afterwards, by giving notice that he disaffirms it. If he dies before coming of age, his heirs or executors have a right to disown and repudiate the note. No part of a note made by a minor under the age of 18 years can be collected, if he repudiates and disaffirms it before he reaches his majority, or within a reasonable time afterwards. If a minor over 18 years of age makes a note, he may likewise repudiate and disaffirm it, before becoming of age or within a reasonable time afterwards, but he must restore the consideration to the party from whom it was received. Thus, if a young man, over the age of 18 and under 21 years of age, borrows a sum of money, and makes his note as security, he may disown and repudiate the contract in the manner before stated, but he must return to the lender the money he actually received. The reason of the distinction between the contracts of minors under the age of 18 and the contracts of minors over 18 years is this, that a minor under the age of 18 is presumed not to have arrived at an age of judgment and discretion sufficient to protect him from the schemes of those who might take advantage of his

infancy to defraud him; and all persons who enter into a contract with a minor under the age of 18 must do so at the peril of having such a contract absolutely disowned and disaffirmed.

Civil Code, Section 35.

Section 707.—NOTE MADE TO MINOR.—A promissory note may be made to a minor, and he takes it subject to the same right to disaffirm the contract as he possesses with relation to a note made by him. If he takes a note made to himself, and does not give notice of disaffirmance to the maker, before he attains his majority or within a reasonable time afterwards, the maker will be bound, and the note can be collected. Also, a minor who takes a note made to himself may transfer it by indorsement to another, and the person to whom he indorses the note can collect it, unless after indorsement the minor gives notice to the maker that he disaffirms and repudiates the note. In other words, the person to whom a minor indorses a note will take it subject to the right of the minor to disaffirm it.

Section 708.—NOTE MADE BY MARRIED WOMAN.—Under the laws of California, married women have many rights which they never had in other countries. In this State a married woman may enter into any contract with any person, respecting property, which she might do if unmarried. She may buy or sell, lease or mortgage, lend or borrow, in her own name and on her own account. It follows, as a matter of course, that a note made by a married woman is a valid and binding obligation, for she has the right to make it. But a note made by a married woman, and signed by her alone, can only be collected out of her separate property. The community property belonging to the husband and wife is not liable for the contracts of the wife made before marriage. The separate property of the wife, out of which alone a note made by

her can be collected, includes all property which she owned before marriage, and all property which she acquires after marriage by gift, or by will, or by descent to her as heir, and the rents and profits of such property. If a note made by a married woman is sued on, the judgment can only be enforced against her separate property. A married woman may contract with her husband as well as with others, and a valid note may be made by her to him.

Civil Code, Sections 158, 162.

Section 709.—NOTE MADE TO MARRIED WOMAN.—A promissory note may be made to a married woman, and she may collect it alone, without reference to her husband, if it relates to her separate property. She may legally take a promissory note from her husband, as well as from others. She may sue in her own name to collect a note made to her, if it concerns her separate property, and her husband need not be a party to the suit.

Code of Civil Procedure, Section 370.

Section 710.—NOTE MADE BY CORPORATION.—A promissory note may be made by a corporation, as well as by a natural person. But there are certain necessary requisites to the validity of a note made by a corporation which do not exist in the case of a natural person. While a man may act as his own individual will shall dictate, a corporation, being a creature without a soul, can only act by means of agents. These agents may have general powers delegated to them, which serve for all occasions, or they may have special powers given them, for a certain prescribed purpose. In either case, many important questions frequently arise as to the power of its agents to bind a corporation. A corporation must be managed and controlled by a Board of Directors, having under them, and subject to their directions, certain officers or other agents. In California, the Board of Directors of a corporation may consist of a number, not less than three, or any larger

number, selected from among the members or stockholders. A majority of the Board constitutes a quorum. Unless a quorum of the Board of Directors is present and acting, no business performed is valid as against the corporation. The Directors are agents of the corporation only when they act as a Board. Therefore, if a corporation makes a note, such action must be authorized by its Board of Directors, a majority of the Board being present. A corporation must have a seal. It can only do the business for which it was organized. A corporation organized for one purpose can not carry on business for another purpose. In the course of its legitimate business, a corporation may borrow money, or secure a creditor, and make its note therefor. This is done by the vote of the Directors, at a regular meeting, a majority being present. A record of the votes must be kept, the ayes and noes being recorded. A majority of the Board must vote in favor of the proposition. The execution of the note being thus authorized, the President may sign the name of the corporation, affix the seal of the corporation, and deliver the note for the corporation. No Director must be financially interested in the transaction in which the note is authorized to be executed, in any way which conflicts with the interests of the corporation. If any director is so interested, and it requires his vote to make a majority in favor of the proposition, the action of the Board will not be legal, and the note will be void. The note must be made in the legitimate business of the corporation, otherwise it will be void. For instance, if the Directors of a banking corporation should borrow money to build a railroad, the building of railroads not being one of its purposes, the act of the Directors is outside of their power, and the note is invalid. Every person taking a note from a corporation is presumed to know the purposes of its organization, and is presumed to know whether the execution of the note was authorized as the law directs. Therefore the person to whom the note is made is bound to inform himself of the facts; for, if the note has not been

made by legal authorization of the Directors, or if it is outside the power of the corporation, and not within its legitimate business, in a suit on the note, the corporation can make that defense and defeat the collection of the note. If a note has been made, in the manner and for a purpose authorized by law, the corporation is legally bound to pay it. And, further, each stockholder in the corporation becomes bound for the payment of the note. Each stockholder is individually and personally liable for such proportion of the note of the corporation as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. The liability of each stockholder is determined by the amount of stocks or shares owned by him at the time the note was made. In corporations having no capital stock, each member is individually and personally liable for his proportion of the amount due on the note. It sometimes happens, too, that, after the President or other agent of the corporation has made a note for it, without authority first given, but for the legitimate uses and purposes of the corporation, the Directors afterward ratify the act of the agent. This ratification may be by a resolution passed at a meeting of the Board, or it may occur where the corporation enjoys, in its proper business, the fruits of the transaction. In either case, the corporation and its stockholders or members are equally bound as when the note is made by previous authority. Where the transaction concerning the execution of a promissory note by a corporation is fully entered in the books of the corporation, and notice thus imparted to it, and after such notice the corporation retains the consideration of the transaction, and thus accepts the benefits, it must be held to have ratified the transaction. (Decided by the Supreme Court of California, in the case of Curtin vs. Salmon River Hydraulic Gold Mining and Ditch Company, which decision is printed in Volume 26, California Decisions, page 949.)

Civil Code, Sections 290, 305, 308, 322.

Section 711.—NOTE MADE TO CORPORATION.—A note may be made to a corporation, as well as by it. The note should be made to the corporation by its corporate name, but a mistake in the name will not invalidate the note. If there is a mistake in the name of the corporation, in the note, that will make no difference, if it can be reasonably ascertained from the note what corporation is intended. Having taken and received the note, the corporation has the same rights, with reference to its collection, as an individual would have.

Civil Code, Section 357.

Section 712.—NOTE MUST BE IN WRITING.—There is no such thing as a verbal promissory note. A promissory note must be in writing.

Section 713.—NOTE MAY BE IN PENCIL.—While a promissory note must be in writing, such writing need not be in ink; it may be in pencil; and it need not be all in the handwriting of the maker; for it may be printed, or it may be typewritten, yet if the name of the maker is signed to it, the note will be valid.

Section 714.—MUST BE FOR THE PAYMENT OF MONEY.—A promissory note must be for the payment of money, and for the payment of money only. So, a written promise to pay money and goods, or to pay goods alone, is not a legal promissory note. No written promise to pay is a valid promissory note, unless it be for the payment of money, and of money only. But it may be made payable in the money or currency of any other country, as well as in the money of the United States. It may be made payable in the money of England, or France, or Spain, or Holland, or Italy, or of any other country, and will be just as binding as though made payable in the coin of the United States. It may be made payable in coins, such as guineas, ducats, doubloons, crowns, or

in dollars, or in pounds sterling. In the ordinary business transactions of this country a note is usually made payable in dollars, gold coin of the United States.

Civil Code, Section 3244.

Section 715.—MUST BE FOR A CERTAIN SPECIFIED AMOUNT.—Not only must the note be for the payment of money, but it must also be for a certain specified amount. The amount stated in the note must be fixed and certain. Therefore, if the promise be, to pay a specified sum of money, with all other sums that may be due; or, to pay a specified sum of money, and the demands of another person; or, to pay a specified sum of money, after deducting allowances and expenses; in all such cases the instrument is void as a promissory note, because the amount to be paid is not fixed with certainty on the face of the note. The amount to be paid, however, if it be a fixed sum, need not be written in words, but may be expressed in figures.

Civil Code, Section 3244.

Section 716.—MUST NOT BE SUBJECT TO ANY CONDITION OR CONTINGENCY.—The note, to be valid, must not be subject to any condition or contingency which might defeat the promise to pay. The money must be payable absolutely, and must not depend upon the happening or not happening of some event. Consequently, if a note is made payable provided a thing is done, or provided a thing is not done, or which makes the payment depend upon any contingency or uncertainty, it is not a valid promissory note.

Section 717.—FORM OF NOTE.—A promissory note need not be in any particular form, so long as it is certainly to be seen on the face of it who is the maker, to whom it is payable, the sum to be paid, and an absolute promise to pay it. The most common form of negotiable

promissory note in use in California, and one which answers every purpose, is as follows:—

....., Cal., ..., 190..

..... after date, for value received, I promise to pay ....., or order, at ....., California, the sum of ..... Dollars, Gold Coin of the United States, with interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually, and if not so paid to be added to the principal and bear interest at the same rate until paid.

.....

Or the note may be made as follows:—

....., Cal., ..., 190..

One day after date, for value received, I promise to pay ....., or order, at ....., California, the sum of ....., Dollars, Gold Coin of the United States, with interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually, and if not so paid to be added to the principal and bear interest at the same rate until paid.

.....

Or the note may be made as follows:—

....., Cal., ..., 190..

For value received I promise to pay ..... or bearer the sum of .....Dollars, Gold Coin of the United States, with interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually, and if not so paid to be added to the principal and bear interest at the same rate until paid.

.....

Section 718.—TIME OF PAYMENT.—It is not absolutely necessary that a note should state the time of payment. If it does state the time of payment, it is due on the day stated, or, when that day is a holiday, the next business day. If it does not specify the time of payment, but merely "For value received I promise to pay," it is payable immediately. If the day of payment falls on

Sunday, or Fourth of July, or Christmas, or Thanksgiving, or any other legal holiday, the note is due on the next day.

Civil Code, Sections 3099, 3132.

Section 719.—PLACE OF PAYMENT.—A note is valid which does not specify any place of payment. If the note specifies a place of payment, as, "At San Francisco," it must be paid at the place specified. If the note does not specify any place of payment at all, it is payable at the residence or place of business of the maker, or wherever he may be found. The holder of the note, when no place of payment is specified, may present it for payment at either the maker's residence, his place of business, or wherever he is found, at his option.

Civil Code, Section 3100.

Section 720.—DATE OF NOTE.—The date of a note need not necessarily be at the beginning. The date may be placed upon any part of the paper, at the top, or at the bottom, or anywhere else on its face, and it will be sufficient. It is not necessary to insert the true date of its signing. Any date may legally be inserted by the maker, whether past, present, or future, and the note will still be valid and binding. In any dispute in court the holder or the maker will be allowed to show the actual time when the note was executed or delivered, or when it was intended by the parties to take effect.

Civil Code, Section 3094.

Section 721.—NOTE NOT DATED IS VALID.—A note is valid although not dated at all. If it bears no date, it will be considered as dated at the time it was executed. And if the holder of a note which bears no date at all sues to collect it, he will be allowed to show by verbal testimony when the note was actually signed, or when it was intended by the parties to take effect.

Civil Code, Section 3091.

Section 722.—HOW MUST BE SIGNED BY MAKER.—The name of the maker may be affixed to any portion of the note, and it will be good. It may be at the beginning, or in the middle, or signed at the end. For instance, if a note begins, "I, John Smith, promise to pay," etc., and is not otherwise subscribed at all, it will be a valid note, because the intention to bind the maker is apparent. The maker's name may be signed in pencil. If the maker cannot write, his signature may be by an X, or mark, his name being written near the mark by another person, who writes his own name as a witness.

Civil Code, Section 14.

Section 723.—FORM OF NOTE SIGNED WITH AN X.—The following is a good form for a note signed with an X, or mark, by a person who cannot write:—

....., Cal., ..., 190..

..... after date, for value received, I promise to pay ....., or order, at ....., California, the sum of ..... Dollars, Gold Coin of the United States, with interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually, and if not so paid to be added to the principal and bear interest at the same rate until paid.

his
SAMUEL X GREEN.
mark.

GEORGE JONES,
Witness to signature of Samuel Green.

Section 724.—MAKER'S NAME SPELLED WRONG.—It will make no difference in the validity of a note that the name of the maker is misspelled in his signature. The note is good if it can be determined, by the face of the note, or the indorsement on its back, who the maker is.

Section 725.—NAME OF PERSON TO WHOM NOTE IS PAYABLE.—The payee need not be named in person,

if some one be indicated. Therefore it is sufficient if the note is made payable "to John Smith, or bearer," or "to the holder," or "to order," for this must be intended to mean whoever comes into lawful possession of it.

Section 726.—NOTE PAYABLE ON OR BEFORE A CERTAIN DATE.—A note may be made payable on or before a certain date, and this will give the maker the right to pay the note at any time before the date named, at his option. But the holder cannot compel the maker to pay the note until the date named in it. Thus, if a note is made payable "on or before one year after date," the maker has a right, if he chooses, to pay the note at any time during the year; but the holder cannot compel him to pay until the year's time has expired.

Section 727.—FORM OF NOTE PAYABLE ON OR BEFORE A CERTAIN DATE.—A good form of note, giving the maker the option of paying at any time before the date named, is as follows:—

....., Cal., ..., 190..

On or before one year after date, for value received, I promise to pay ....., or order, at ....., California, the sum of ..... Dollars, Gold Coin of the United States, with interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually, and if not so paid to be added to the principal and bear interest at the same rate until paid.

.....

Section 728.—NOTE WITH PAYEE BLANK.—A note may be made with the payee blank, that is, with a blank space for the payee's name to be inserted, and it will be payable to bearer. It passes by delivery, and any bona fide holder for value may fill it up with his own name and sue upon it.

Section 729.—NOTE PAYABLE TO ORDER OF MAKER.—A note may be made payable to the order of the maker. For instance, the note may call for payment "to the order of myself," and be indorsed by the maker to another person. The holder will take a valid note by such indorsement, and the maker will be bound.

Section 730.—WHEN NOTE IS NEGOTIABLE.—In order for a note to be negotiable, it must be made payable to "order," or to "bearer." Without these words, the note is not negotiable. By a negotiable note is meant an instrument which passes from one person to another by indorsement and delivery, and which, if transferred before it is due, entitles the holder to collect the full amount which its face calls for. But there must be something on the face of the note to indicate the intention of the parties that it shall be transferable by indorsement, negotiable; and commercial custom and the law of California provides that such intention must be made manifest on the face of the note, by the use of the word "order" or "bearer."

Civil Code, Section 3087.

Section 731.—WHEN NOTE IS NOT NEGOTIABLE.—A note which is merely made payable to a certain person, and not to "order," or not to "bearer," is not negotiable. But, besides the omission of these words of negotiability, there are other things which destroy the negotiable character of a note. Thus, if a note is made payable out of a certain specified fund, it is not negotiable.

Section 732.—DIFFERENCE BETWEEN NEGOTIABLE NOTE AND NOTE NOT NEGOTIABLE.—In the law of California, as applied to common business affairs, the essential difference between the two kinds of notes, a note which is negotiable and a note which is not negotiable, will be found to be this: A negotiable note passes from one to another by delivery and indorsement, and may pass through

an indefinite number of hands, and so long as it is indorsed for value, before becoming due, the holder acquires an absolute claim against the maker. The note, by being made payable to order, or to bearer, being negotiable, is a circulating credit, and it makes no difference to the holder that the maker of the note and the payee named in it may have had other dealings between themselves, on account of which the payee may have become indebted to the maker; and in a suit upon a negotiable note, which has been indorsed for value to a third person, the maker cannot set up against the note anything which the payee owes him. The maker of a negotiable note, indorsed by the payee for value to another, must pay the whole note. But a note which is not negotiable stands upon a different footing. It may pass from the payee to whom it was made, for it may be assigned by the original holder to another. But the assignee of a non-negotiable note takes it subject to all set offs which the maker may have against the original holder. Let us suppose that Jones makes his note to Smith for $500, and the note is not negotiable, and Smith assigns it to Green, but at that time Smith has become indebted to Jones upon another contract, in the amount of $250; when Green sues to collect the note, Jones can set off against the $500 note the $250 which Smith owed him. It will make no difference that Green paid Smith the full $500 called for by the note; the note was not negotiable, and he was bound to take it, if he chose to take it at all, subject to any defense which the maker might have acquired against his assignor.

Civil Code, Section 1459.

Section 733.—JOINT NOTE.—Two or more persons may make a note, and become jointly liable to pay it. That is, the intention may be expressed by two or more makers of a note that they will take upon themselves the mutual and joint obligation of paying the sum of money specified in it.

Civil Code, Section 1430.

Section 734.—FORM OF JOINT NOTE.—A joint note may be made in the following form:—

....., Cal., ..., 190..

..... after date, for value received, we promise to pay to ....., or order, the sum of ..... Dollars, Gold Coin of the United States, with interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually, and if not so paid to be added to the principal and bear interest at the same rate until paid.

.....

.....

Section 735.—LIABILITY ON JOINT NOTE.—The makers of a joint note are all liable together, each for his proportionate share, and must all be sued together. But one of the makers of a joint note, who satisfies more than his share of the claim against all, may compel all the parties joined with him to contribute their proportion of the amount so paid by him.

Civil Code, Section 1432.

Section 736.—JOINT AND SEVERAL NOTE.—Several persons may make a note so as to become jointly and severally liable to pay it; such a note expressing the intention, that the holder may have the right to call upon all or any one or more of the makers for payment of the note, at his option.

Civil Code, Section 1430.

Section 737.—FORM OF JOINT AND SEVERAL NOTE.—A joint and several note may be made in the following form:—

....., Cal., ..., 190..

..... after date, for value received, we or either of us promise to pay ....., or order, at ....., California, the sum of .... Dollars, Gold Coin of the United States, with

interest thereon in like Gold Coin at the rate of ..... per cent per annum from date until paid. Interest payable semi-annually and if not so paid to be added to the principal and bear interest at the same rate until paid.

.....

.....

Section 738.—LIABILITY OF MAKERS OF JOINT AND SEVERAL NOTE.—The makers of a joint and several note are liable in a twofold capacity. All are liable together, each for his proportionate share of the sum specified in the note, and each one of the makers is severally liable, standing alone. The holder of the note may sue all of the makers together, and recover a judgment against all, or he may, at his option, sue any one of the makers alone, and compel him to pay the whole note. If one of the makers is compelled to pay the whole note, he, in turn, may compel the others to pay him their proportionate share for which they became liable on the note. With this, however, the holder has nothing to do. He has the right to single out any one or more of the signers of a joint and several note, and collect from him or them, or he may collect from all.

Section 739.—INTEREST.—The California law of interest does not recognize usury, and any rate may be charged which the parties agree upon. In many States of the Union the law limits the rate of interest which can be charged to a certain per cent per annum, ranging in amount from 5 to 12 per cent; but in California the conditions of settlement and early business dealings always were such as to encourage inflation and speculation, and consequent high rates of interest, and the Legislature has several times refused to enact a law against usury. Therefore the law now is that the parties to a promissory note may agree upon any rate of interest, and the note will be valid.

Section 740.—LEGAL RATE OF INTEREST.—The legal rate of interest in California, that is, the rate allowed by law when the note does not say anything about interest, is seven per cent per annum. Therefore, if a note is made which does not say anything at all about interest, and suit is brought to collect it, the judgment against the maker will bear interest at the rate of seven per cent per annum. This interest will commence at the date when the note became due.

Section 741.—ATTORNEY FEES.—A note may be made providing that, in the event of the holder commencing suit to collect it, the maker will pay an attorney fee to the payee. Such a note is negotiable. The session of the Legislature of 1905 adopted an amendment to the Civil Code, providing that a negotiable note may provide for the payment of attorney's fees and costs of suit, in case suit be brought to collect the note, and the note will still be negotiable. (Amendment to Section 3088, Civil Code, approved March 10, 1905.)

Section 742.—WHEN NOTE IS OUTLAWED.—In California a note is outlawed if it is allowed to run more than four years after it becomes due. For instance, if a note is made payable one year after date, it will not outlaw for five years; the holder may commence a suit on the note after the expiration of the one year; but he may wait, and commence the suit at any time within four years after the note by its terms becomes due. The same rule of course applies to a note made payable at any other term. The note remains good for four years after it is due. After four years from the date when the note becomes due, in a suit upon the note, the maker or other person liable to pay it can set up as a defense that it is outlawed. And if in fact the holder has waited more than four years after the note has become due, before commencing a suit upon it,

the note will be outlawed, and cannot be collected if such defense is made.

Code of Civil Procedure, Section 337.

Section 742a.—APPARENT MATURITY OF NOTE.—The apparent maturity of a promissory note, payable at sight or demand, is as follows: If it bears interest, one year after its date; or, if it does not bear interest, six months after its date. Therefore, if an interest-bearing note is made, reading, "For value received I promise to pay," etc., it matures one year after its date. If the holder presents the note for payment within one year from its date, he has four years from the time when he demands payment in which to sue upon the note. If he does not demand payment until after one year from its date, the four years will not begin at the time when he demands payment, but will begin one year after the date of the note. Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned.

What has been said above applies only to promissory notes in which the time of maturity does not appear upon the face of the note, that is, where the time when the note becomes due is not stated.

Civil Code, Sections 3135, 3136.

Section 743.—WHEN OUTLAWED NOTE IS RENEWED.—A note is renewed by the promise of the maker to pay the sum due. But the promise must be in writing, in all cases, or the note will not be renewed. There must be a written acknowledgment of the debt and an unconditional promise to pay it, in order to revive it, after a note is outlawed. The acknowledgment and promise are not required to be in any particular form. It may be indorsed on the note; it may be by letters written by the maker to the creditor; or it may be by writing, in the form of a contract, to revive and keep alive the note. But in whatever form the writing is, whether by indorsement, or letter,

or formal contract, the written promise must be signed by the debtor and made to the creditor. If the maker of the note admits, after it is outlawed, to a third person that he owes the money, the note will still remain outlawed. The law is that the acknowledgment of an outlawed debt and the new promise to pay it, must be made to the creditor himself, and must be in writing, signed by the debtor. The payment of interest will not revive an outlawed note, unless such payment is accompanied by a written acknowledgment of the principal debt and a promise to pay it. A part payment of the amount of a note, after it has become outlawed, will not revive the whole debt without a written acknowledgment. A letter from the maker of the note to the creditor, after it is outlawed, expressing a desire to pay it, will revive the debt and create a new promise to pay. The holder of the note may then sue to collect the amount due, at any time within four years after the new promise was made. The effect of the new promise to pay is to extend the obligation of the debtor four years longer. If one only of several joint makers of a note, after it is outlawed, signs a written acknowledgment and promise to pay the debt, he binds himself alone. He cannot bind anybody but himself, and if the creditor wants the obligation extended as to all the joint makers of the note, he must get the signatures of all.

Code of Civil Procedure, Section 360.

Section 744.—INDORSEMENT OF NEGOTIABLE NOTE.—A negotiable note, if payable "to order," passes from one person to another by indorsement. This indorsement must be in writing. One who agrees to indorse a negotiable note is bound to write his signature upon the back of the note, if there is sufficient space on the back for that purpose. But it sometimes happens that the holder of a note has written on the back acknowledgments of money paid, or that many previous indorsers have signed their names, and in this manner the entire back of the note

is covered, and there is no more room for any further writing upon it. The law of California provides, that when this happens, the holder may pin or paste on a piece of paper sufficient for his own and subsequent indorsements. Such addition to the original note thus becomes incorporated as a part of it. A note with the name of the holder written by him on the back, or, if there is no room on the back, on a piece of paper pinned or pasted to the note, passes the legal title in the debt to the person to whom the note is delivered.

Civil Code, Sections 3108, 3109, 3110.

Section 745.—KINDS OF INDORSEMENTS.— There are two kinds of indorsements; one is called a general indorsement, and the other is called a special indorsement.

Section 746.—GENERAL INDORSEMENT.—A general indorsement is one where the name of the indorser is written on the back of the note, without writing the name of any indorsee. The note may then be delivered to anybody. The indorsement is general, because not made to any one in particular. Therefore the title to the note passes to any person to whom it is delivered, is payable to the bearer, and may be indorsed and transferred by the bearer

Section 747.—SPECIAL INDORSEMENT.—A special indorsement is where the holder writes his name on the back of the note, and also writes the name of the indorsee, thus specifying a particular person to whom payment is to be made. A note thus indorsed cannot be indorsed again and passed on by anybody but the indorsee whose name is written on the back of the note.

Civil Code, Section 3112, 3113.

Section 747a.—INDORSER OF NON-NEGOTIABLE NOTE.—One who writes his name upon the back of a non-negotiable promissory note, to give it credit, is a guarantor,

and is liable prima facie for the payment of the note upon default of the maker.

Where a corporation has received the money obtained on a promissory note, upon which its name appears as an indorser, it cannot thereafter question the authority of its officers to make such indorsement. (Decided by the California District Court of Appeals, in the case of Tilden vs. Goldy Machine Co., which decision is printed in California Appellate Decisions, Volume 7, page 323.)

Section 748.—ASSIGNMENT OF NOTE NOT NEGOTIABLE.—The difference between a note which is negotiable, and a note which is not negotiable, has been explained. A note which is not negotiable, for any reason, may nevertheless be transferred, by assignment. There is no particular form of assignment. The following words written on the back of a non-negotiable note are sufficient to assign the note from the holder to another person:—

"I hereby assign the within note to John Smith.

"James Green."

It has also been held by the courts that a non-negotiable note may be legally assigned by the mere indorsement of the name of the holder and a delivery of the note to another person.

Section 749.—LIABILITY OF INDORSERS.—Every indorser of a negotiable note, unless his indorsement is qualified in some way, by his indorsement warrants to every subsequent holder thereof that the note is in all respects what it purports to be; that he has a good title to it; that the signatures of all prior parties are genuine; and that if the note is dishonored the indorser, upon notice of the dishonor being given him, will pay the amount due on the note, with interest, to the indorsee or other holder. Any number of indorsements may be made of a promissory note, and the last indorsee may look to all of the indorsers for his money, and he will have the same rights against

every one of the indorsers as he has against the particular holder who indorsed the note to him. Sometimes a note, which has been indorsed by a prior indorser, comes back again to him by re-indorsement in the course of business, when he will thereby become reinstated in his original rights in the note; but he will have no claim upon any of the indorsers whose names appear on the note subsequent to his own. The indorsement of a note amounts to a contract on the part of the indorser, unless he qualifies his indorsement, that he will pay the indorsee, or other holder, the amount due, upon receiving notice of the dishonor of the note.

Civil Code, Sections 3116, 3120.

Section 750.—INDORSEMENT "WITHOUT RECOURSE."—An indorsement may be so qualified that the liability of the indorser will be greatly limited. Thus, if the indorser writes his name on the back of the note, and adds the words, "without recourse," he thus notifies the person to whom he transfers the note that he will not be responsible as an indorser, and cannot be held liable in case the maker does not pay. But there are circumstances under which the indorser "without recourse" will nevertheless be liable. By the act of transferring and delivering the note to another, although indorsed "without recourse," the indorser impliedly warrants that the note is valid, that the signatures of prior parties whose names appear thereon are genuine, that the note has not been paid, and that he himself has practiced no fraud in the transfer.

Section 751.—RIGHTS OF INDORSEE IN DUE COURSE OF BUSINESS.—An indorsee in due course of business, who acquires for value a promissory note duly indorsed, before its apparent maturity, and without knowledge of its actual dishonor, gets an absolute title to the note. It is thereafter valid in his hands, notwithstanding any defect in the title of the person from whom he acquired

it. It has been said that the law of California cuts off all defenses on the part of the maker of a note, as against a holder in due course of business.

Civil Code, Sections 3123, 3124.

Section 752.—WHEN NOTE MUST BE PRESENTED FOR PAYMENT.—Many vexatious questions constantly arise about the presentation of a note for payment, and these usually refer to the indorsers. The maker is bound whether the note is presented to him or not, for he agrees to pay it at all events. But the indorser occupies a different position. He agrees to pay if the note is dishonored. The indorser is only a surety. So, before the indorser can be called upon for the money, the holder, whoever he is, must try to collect the money from the maker of the note. The Legislature of California has prescribed by law when a note must be presented for payment. The law provides, that a note payable on demand may be presented to the maker for payment upon any day; but a note made payable at a certain specified time must be presented for payment upon the day it is due. It must be presented within reasonable hours; and if it be payable at a bank, within the usual banking hours of the vicinity, unless the person to whom it should be presented consents to its being presented at any hour of the day. What are reasonable hours, within which the note must be presented, will depend upon circumstances. If the maker has a place of business, it must be presented within the usual business hours of the place or town; if presented at the maker's residence, it may be presented during the whole day until the hours of rest in the evening.

Civil Code, Section 3131.

Section 753.—BY WHOM NOTE MUST BE PRESENTED FOR PAYMENT.—The holder of the note must present it to the maker. By this is not meant that the holder should go in person and present the note. He may

go in person, or he may send his agent or attorney. If the holder is dead, at the time the note is due, then the executor or administrator of his estate can present the note and demand payment.

Section 754.—TO WHOM NOTE MUST BE PRESENTED FOR PAYMENT.—The note must be presented to the maker, if he can be found at the place where presentment should be made. If the maker cannot be found there, then it is lawful to present the note to his agent in charge of his place of business or other place specified in the note as the place of payment. It may be presented to a clerk of the maker at his place of business; or to one partner of a firm, if a firm note; or to the administrator or executor of a deceased maker; or to an employee of the maker at the place where the note is to be presented, if one can be found there, and the maker cannot be found.

Section 755.—AT WHAT PLACE NOTE MUST BE PRESENTED FOR PAYMENT.—A note which specifies a place for payment must be presented there. It is a common thing for notes to be made payable at a certain bank, and in such case it will not do to present the note anywhere else, and so as to any particular place of payment specified in a note. If a note does not name any particular place for its payment, then it must be presented at the place of residence or the place of business of the maker, or wherever he may be found. It is at the option of the holder, where no place is specified in the note, whether he will present it to the maker at his residence, or his place of business, or in the street, or at any other place which may appear convenient.

Section 756.—WHAT WILL EXCUSE PRESENTMENT FOR PAYMENT.—There are some circumstances which under the law of California will excuse presentment for payment. If the maker of the note has no place of

business, or if his place of business or residence cannot, with reasonable diligence, be ascertained, then presentment for payment is excused and the indorser is bound. If the maker moves away, after executing the note, and the holder makes diligent inquiry, and cannot learn his residence or place of business when the note becomes due, the failure to present the note to the maker for payment, under such circumstances, will not relieve the indorser from liability. This is upon the principle that the holder has done all he can do, has shown good faith and diligence, and there is no reason why the indorser should be allowed to take advantage of a circumstance over which the holder of the note had no control.

Section 757.—WHAT IS REASONABLE DILIGENCE.—Reasonable diligence is a question of circumstances. Inevitable accident or overwhelming calamity may prevent the holder of a note from presenting it for payment to the maker on the day it is due, yet if he does present it at the very earliest practicable time thereafter, it will be sufficient. For it may happen that the holder had the intention in good faith to present the note at the proper time, yet all intercourse is stopped between the places where the holder and the maker live, by freshets, or by violent storms, or earthquakes, or other unforeseen conditions of natural objects rendering travel or communication impossible; or the presence of some dread and contagious disease in one or the other neighborhood, such as the yellow fever, or cholera, or smallpox, renders commercial intercourse impossible; or a political revolution may exist in the place where the holder or the maker lives, and by a blockade, or a battle, prevent the holder from presenting the note on the day when it is due; or war may be going on between the country where the maker lives and the country where the holder resides. In all the cases above supposed, if the note is presented within a reasonable time after the prohibitive obstacle is removed, it will be held sufficient under the law

Section 758.—WHEN A NOTE IS DISHONORED.—A note is dishonored when it is not paid, on presentment to the maker for that purpose; and it is also dishonored when it is not paid without presentment, when presentment is excused.

Civil Code, Section 3141.

Section 759.—NOTICE OF DISHONOR.—If the holder wishes to make the indorser pay the note, after vainly attempting to collect it from the maker, he must give the indorser notice of the dishonor of the note. He may give the notice in person, or through his agent. A Notary, attorney, or bank, or other agent for collection, may give the notice as the agent of the holder. If there are several indorsers on a note, and notice of dishonor is given by the holder to the last indorser, he in turn must give notice of the dishonor to the indorser immediately before him, otherwise he cannot reimburse himself for the amount he is compelled to pay the holder.

Civil Code, Section 3142.

Section 760.—HOW NOTICE OF DISHONOR MAY BE GIVEN.—A notice of dishonor may be given by delivering it to the indorser, personally, at any place; or, by delivering it to some person of discretion, at the place of residence or business of the indorser, apparently acting for him; or, by getting the best information obtainable of the place of residence of the indorser, and depositing the notice in the mail directed to the indorser at that place, postage paid. In case of the death of the indorser, the notice must be given to his executor or administrator, or if there is no executor or administrator, then to any member of his family who resided with him at his death, or if he had no family, then it must be mailed to his last place of residence. A notice of dishonor sent to an indorser after his death is nevertheless valid, if the person

sending it was ignorant of his death, and could not by ordinary diligence have ascertained the fact.

Civil Code, Sections 3144, 3145, 3146.

Section 761.—WHEN NOTICE OF DISHONOR MUST BE GIVEN.—If the notice of dishonor of a note is not given by mail, then it must be given either on the same day the maker fails to pay it, or on the next business day thereafter. When notice of dishonor is given by mail, it must be deposited in the post-office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place where the note was dishonored for the place to which the notice should be sent. The holder has at least the whole forenoon of the first business day after the dishonor to send off the notice. One of several indorsers, who receives notice of dishonor from the holder of the note, has the same time to give notice to another indorser; that is, he must give notice to a prior indorser either on the same day he receives his notice from the holder, or on the next business day, unless he gives notice by mail, which must be in the same manner as the holder is required to give notice by mail.

Civil Code, Sections 3147, 3148, 3150.

Section 762.—FORM OF NOTICE OF DISHONOR.—No particular form of notice is necessary. It may be given in any form which describes the note with reasonable certainty, and substantially informs the party receiving it that the note has been dishonored. The following is a form of notice in writing, to be served on the indorser:—

....., Cal., ..., 190..

JOHN GREEN:—

Dear Sir: You are hereby notified that the certain note made and delivered by John Smith to Samuel Stokes, dated April 1st, 1901, for $500, and interest at 8 per cent per annum, and indorsed April 1st, 1902, by you, is now held by me; that on the day when said note was due I presented

it for payment to the said John Smith and demanded payment, but he failed and refused to pay the same; and I hereby notify you that I will hold you for the amount due on said note. JAMES BROWN.

Section 763.—WHEN NOTICE OF DISHONOR IS EXCUSED.—Notice of the dishonor of a note is excused, when the holder cannot, with reasonable diligence, ascertain either the place of residence or business of the indorser to be charged; or, when there is no mail communication between the town of the holder and the town in which the place of residence or business of the party to be charged is situated; or, when the notice is waived by the party himself upon whom it was to be served. If, before or after a note becomes due, an indorser has received full security, or the maker has assigned all his estate to him as such security, presentment and notice to him are excused. Delay in giving notice of dishonor is also excused, when caused by circumstances which the holder could not have avoided by the exercise of reasonable care and diligence—as, by an epidemic, or riot, or war, or flood, or storm.

Civil Code, Sections 3156, 3157, 3158.

Section 764.—PROTEST OF FOREIGN NOTE.—What has been said of notice of dishonor applies only to a note made and payable in California. A note made in a foreign country, or in another State, and sent to this State for collection and dishonored, must be protested by a Notary Public.

Section 765.—WHEN SUIT TO COLLECT NOTE CAN BE BROUGHT.—In California a suit to collect a note can be brought at any time within four years after it is due, provided the note was made in this State. If the note was made out of the State, a suit can be brought in this State to collect it at any time within two years after it is due.

Code of Civil Procedure, Sections 337, 338.

Section 766.—IN WHAT COURT SUIT TO COLLECT NOTE MUST BE BROUGHT.—In all cases where the sum sued for amounts to $300, exclusive of interest, the suit must be brought in the Superior Court. In cases where the sum sued for, exclusive of interest, amounts to less than $300, the suit must be brought in the Justice Court.

Code of Civil Procedure, Sections 76, 112.

Mortgages

Section 767.—MORTGAGE SECURITY.—The ordinary security for the payment of a promissory note is a mortgage of either personal or real property. By a mortgage the debtor secures his creditor without the necessity of changing the possession of the property.

Section 768.—WHAT INTEREST IN REAL PROPERTY MAY BE MORTGAGED.—Any interest in real property which is capable of being transferred may be mortgaged. Interest in real property covering the absolute title in fee simple may, of course, be mortgaged. But the right to mortgage does not stop here. The interest of an heir or devisee under a will, being a vested right, may be mortgaged. One in possession of the land under a verbal agreement to purchase may mortgage the interest that he has. Any interest in the reversion of lands, or any interest in lands which will surely come to a person upon the happening of some event, may be mortgaged.

Civil Code, Section 2947.

Section 769.—WHAT PERSONAL PROPERTY MAY BE MORTGAGED.—Mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except the following:

1. Personal property not capable of manual delivery;
2. Articles of wearing apparel and personal adornment;
3. The stock in trade of a merchant.

Act of the Legislature, approved February 20, 1909.

Section 770.—HOW MORTGAGE IS EXECUTED AND ACKNOWLEDGED.—A mortgage must be in writing, and signed by the mortgagor. It should be recorded, and therefore must be acknowledged before an officer authorized to administer oaths. It is usual in California to have a mortgage acknowledged before a Notary Public, but an acknowledgment before a Justice of the Peace, or County Clerk, or County Recorder, is equally good. If the person executing the mortgage cannot write, he may sign the mortgage by an X or mark, with two witnesses to his signature.

Section 771.—MORTGAGE OF MARRIED WOMAN.—A married woman may mortgage her own property, without the consent of her husband, and without his joining her in the mortgage in any way. A married woman's acknowledgment to a mortgage is made in the same manner as that of any other person.

Section 772.—MORTGAGE OF MINOR.—A minor in California cannot under the age of 18 make a contract relating to real property. Over the age of 18 he may execute a mortgage of his real property, but it is voidable at his election when he comes of age. He may mortgage his personal property, whether under or over 18 years of age, provided the property is in his own possession or control; but this mortgage is also subject to be disaffirmed by him when he comes of age.

Section 773.—MORTGAGE OF PARTNERSHIP PROPERTY.—Partners may make a mortgage of partnership property, but they must sign their own names. Thus, if Samuel Jones and James Smith are partners, doing business under the firm name of Jones & Smith, their mortgage of partnership property should not be signed with the firm name, "Jones & Smith," but should be signed with their individual names, "Samuel Jones. James Smith."

Section 774.—RECORDING MORTGAGES.—The law of California provides for the acknowledgment and recording of mortgages, real or personal. The mortgage is recorded in the office of the County Recorder of the county where the property is situated.

Section 774a.—PROOF OF EXECUTION OF MORTGAGE.—It sometimes happens that a mortgage is made, but not acknowledged by the mortgagor; and the holder of the mortgage afterwards desires to record it. Not having been acknowledged when made, it is not entitled to be recorded. But the law provides that proof of the execution of the mortgage, when not acknowledged, may afterwards be made by either the mortgagor or the mortgagee. Proof is made by going before a Notary Public, or other officer authorized to take acknowledgments, who upon the evidence presented to him certifies to the fact of the execution of the mortgage. When there is a defect in the Notary's certificate, any party interested may sue in the Superior Court and obtain a judgment correcting the certificate.

Section 775.—EFFECT OF RECORDING MORTGAGES OF REAL PROPERTY.—The effect of recording a mortgage of real property is to give notice to the world of the encumbrance upon it, and to give the mortgage precedence over every other lien which subsequently attaches to the property. A recorded mortgage has precedence over one of earlier date which was not recorded, and of which the holder of the recorded mortgage had no notice. A recorded mortgage is good against an attachment or homestead subsequently put on the property, or any other lien subsequent to the mortgage.

Section 776.—EFFECT OF RECORDING A CHATTEL MORTGAGE.—A mortgage of personal property must be recorded in the office of the County Recorder of

the county in which the mortgagor resides. But if the mortgagor resides in one county, and the property is situated in another county, then the mortgage must be recorded in both counties. If the property is removed to another county by the mortgagor, the mortgagee must, within thirty days, cause the mortgage to be recorded in the county to which the property has been removed. If these provisions are complied with, a chattel mortgage, properly executed, gives the same prior lien to the mortgagee of personal property which he would acquire under a recorded real estate mortgage. A certified copy of a mortgage of personal property once recorded may be recorded in any other county.

Civil Code, Sections 2959, 2964, 2965.
Act of the Legislature, approved February 22, 1909.

Section 777.—MORTGAGE NOT RECORDED GOOD BETWEEN PARTIES.—Even though a mortgage is not recorded, it is good between the parties to it, if the mortgage was executed and signed in the manner provided by law.

Section 778.—MORTGAGE ON HOMESTEAD.—A mortgage on a homestead is void unless it is signed and acknowledged by both husband and wife. A mortgage may be given by the husband alone, on community property, if there is no homestead, and it will be good. But the law of California provides that a mortgage made after a homestead has been filed, signed by the husband alone, is absolutely void. The homestead may be mortgaged, but it must be by the joint act of the husband and wife. They must both sign the mortgage at the time it is made, and they must both know that it covers the homestead property. So, if the husband signs a mortgage on the homestead, and his wife is induced to sign it also, but under the belief that the mortgage covers other property alone, it will not be

good against the homestead. A mortgage of the homestead, to be valid, must be the united act of the husband and wife.

Civil Code, Section 1242.

Section 779.—DECLARATION OF HOMESTEAD.—Sometimes a question will arise as to whether there is a legal homestead on file, sufficient to protect the property against creditors. This question will be easily answered, by getting from the County Recorder a copy of the declaration of homestead. The law provides what must be stated in the declaration of homestead filed with the County Recorder, and from what property the homestead may be taken. If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family, the homestead can be selected from any of his or her property. In order to select a homestead, the claimant must sign and acknowledge a declaration and file it for record in the office of the County Recorder. The declaration of homestead must contain: (1) A statement, showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit; (2) a statement that the person making it is residing on the premises, and claims them as a homestead; (3) a description of the premises; (4) an estimate of their actual cash value.

Civil Code, Sections 1237, 1238, 1261, 1263.

Section 780.—FORM OF DECLARATION OF HOMESTEAD BY HUSBAND AND WIFE.—The following is a good form of Declaration of Homestead by husband and wife, which must be recorded in the office of the County Recorder of the county where the land is situated:—

DECLARATION OF HOMESTEAD:—Know all men by these presents, that we do hereby certify and declare that we are husband and wife, and that we do now at the time of making this declaration actually reside together on the land and premises herein described; that the land and premises on which we reside are situate, bounded, and described as follows, to-wit:—

(Here insert description of land.)

....

That it is our intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a homestead, and we do hereby select and claim the same as a homestead; that we make this declaration for our joint benefit, and we declare that we have not heretofore made a declaration of homestead; that the actual cash value of said property we estimate to be $.....

In witness whereof, we have hereto set our hands and seals this ..... day of ....., 190..

..... (Seal.)

..... (Seal.)

State of California, }
County of ..... } ss.

On this ..... day of ....., 190.., before me, a Notary Public in and for said County and State, personally appeared ..... and ....., personally known to me to be the persons described in and who executed the foregoing Declaration of Homestead, and they acknowledged to me that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, on this ..... day of ....., 190..

.....

Notary Public in and for the County of .....,
State of California.

Commission expires ....., 190..

Section 781.—FORM OF DECLARATION OF HOMESTEAD BY HUSBAND.—The following is a good form

of Declaration of Homestead by the husband alone, and must be recorded in the office of the County Recorder of the county in which the land is situated:—

DECLARATION OF HOMESTEAD:—

Know all men by these presents, that I do hereby certify and declare, that I am the head of a family; that I do now at the time of making this declaration actually reside with my family on the land and premises hereinafter described; that the land and premises on which I reside are situate, bounded, and described as follows, to-wit:—

....

(Here insert description of land.)

....

That my wife's name is .....

That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a homestead, and I do hereby select and claim the same as a homestead; that I make this declaration for the joint benefit of myself and wife, and I declare that my wife has not made a declaration of homestead; that the actual cash value of said property I estimate to be $.....

In witness whereof, I have hereto set my hand and seal this .....day of ....., 190..

..... (Seal.)

State of California, }
County of ..... } ss.

On this ..... day of ....., 190.., before me, a Notary Public in and for the said County and State, personally appeared ....., personally known to me to be the person described in and who executed the foregoing Declaration of Homestead, and he acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, on this ..... day of ....., 190...

.....

Notary Public in and for the County of .....,
State of California.

Commission expires ....., 190..

Section 782.—FORM OF DECLARATION OF HOMESTEAD BY WIFE.—The following is a good form of Declaration of Homestead by the wife alone, and must be recorded in the office of the County Recorder of the county in which the land is situated:—

DECLARATION OF HOMESTEAD:—

Know all men by these presents, that I do hereby certify and declare, that I do now at the time of making this declaration actually reside with my family on the land and premises hereinafter described; that the land and premises on which I reside are situate, bounded, and described as follows, to-wit:—

....

(Here insert description of land.)

....

That my husband's name is .....

That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling house thereon, and its appurtenances, as a homestead, and I do hereby select and claim the same as a homestead; that I make this declaration for the joint benefit of myself and husband, and I declare that my husband has not made a declaration of homestead; that the actual cash value of said property I estimate to be $.....

In witness whereof I have hereunto set my hand and seal this ..... day of ....., 190..

..... (Seal.)

State of California, }
County of ..... } ss.

On this ..... day of ....., 190.., before me, a Notary Public in and for the said County and State, personally appeared ....., personally known to me to be the person described in and who executed the foregoing Declaration of Homestead, and she acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, on this ..... day of ....., 190..

.....

Notary Public in and for the County of .....,
State of California.

Commission expires ....., 190..

Section 783.—VALUE OF HOMESTEAD.—The homestead of husband and wife must not exceed in value the sum of $5,000. The value of the homestead selected by the head of a family other than the husband or wife must not exceed in value the sum of $1,000. Besides the husband or wife, any other person may take a State homestead, as the head of a family, who has residing on the premises and is caring for and maintaining, his or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband, a minor brother or sister or the minor child of a deceased brother or sister, a father, mother, grandmother, or grandfather of a deceased husband or wife, or an unmarried sister.

Civil Code, Section 1261.

Section 784.—FORM OF REAL ESTATE MORTGAGE.—A good form of mortgage on real estate is as follows, the blank spaces to be filled in with the proper names, dates, amounts, and descriptions:—

This mortgage made the .... ..day of ....., in the year 190.., by .....
....
Mortgagor ..... to .....Mortgagee .....
Witnesseth ....
That the Mortgagor ..... mortgages to the Mortgagee ..... those certain lots, or tracts of land situated in ..... County, State of California, particularly described as follows, to-wit:—

....

(Here insert description of property.)

....
....
....
....
....
....

as security for the payment of a certain obligation in writing, of which the following is a copy:—

....., Cal., ..., 190..

..... after date .....
for value received, ... promise to pay .....
....., or order, at .....,
..... Dollars, with interest from ..... at the rate of ..... per cent per annum, payable semi-annually, principal and interest payable in United States Gold Coin. Interest if not paid when due, to be added to the principal and bear interest at the same rate until paid.

.....

.....

$.....

But in case default be made in the payment of either the principal or any installment of interest provided for in said obligation when due, then the whole shall be due at the option of the holder of the said obligation, and action may be immediately commenced, without notice, to foreclose this mortgage.

And the plaintiff, in action to foreclose this mortgage shall, upon filing the complaint in foreclosure, be entitled to ..... per cent on the amount due on said obligation as counsel fees.

And the holder of said obligation may pay all taxes or other encumbrances now subsisting or hereafter to be laid upon said land, and may at his option keep fully insured against all risks by fire the buildings which are now and may be hereafter erected thereon, and such payment shall be allowed with interest thereon at the rate of one per cent per month.

And the cost of foreclosure and sale, counsel fees, and all payments herein provided for, are and shall be a charge upon the property described herein, and repayable on demand, and payable out of the proceeds of the sale thereof.

IN WITNESS WHEREOF, the said Mortgagor, ...
....., has hereunto set ..... hand ... and seal..., the day and year first above written.

..... (Seal.)
..... (Seal.)
..... (Seal.)

State of California, }
County of ..... } ss.

On this ..... day of ....., A. D. one thousand nine hundred and ....., before me....., a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared

....

....

....

known to me to be the person whose name is subscribed to and who executed the within instrument, and he acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the ..... County of ....., the day and year in this certificate first above written.

.....

Notary Public in and for the County of .....,
State of California.

Commission expires ....., 190..

Section 785.—RULES WHICH APPLY TO CHATTEL MORTGAGES.—The law provides how a mortgage of personal property must be made, and because this kind of mortgage is on movable property, subject to transportation from one place to another, the law makes certain strict rules which must be applied to the making of every chattel mortgage in this State. A mortgage of personal property is void as against creditors of the mortgagor, unless it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; and a mortgage without this affidavit is also void as against subsequent purchasers and encumbrancers of the property who become such in good faith and for value. The law also provides that a mortgage of personal property, to be valid against creditors of the mortgagor, or against subsequent purchasers or

encumbrancers in good faith and for value, must be acknowledged, or proved, certified, and recorded in like manner as deeds of real property.

Civil Code, Section 2957.

Section 786.—FORM OF CHATTEL MORTGAGE.—A good form of mortgage on personal property is as follows, the blank spaces to be filled in with the proper dates, names, amounts, and descriptions:—

THIS MORTGAGE made the ..... day of ....., in the year 190.., by ..... by occupation a ....., Mortgagor, to ....., by occupation a ....., Mortgagee.

WITNESSETH: That the Mortgagor mortgages to the Mortgagee all that certain personal property, with the increase thereof, situated in ..... County, State of California, and more particularly described as follows, to-wit:—

....

(Here insert description of property.)

....

....

....

....

as security for the payment to the said Mortgagee of the sum of ..... Dollars, Gold Coin of the United States, on the ..... day of ....., 190.., with interest thereon at the rate of ..... per cent per annum, payable semi-annually, according to the terms and conditions of a certain promissory note of which the following is a copy:—

....., Cal., ..., 190..

..... after date .....,
for value received, ... promise to pay .....
....., or order, at .....
..... Dollars, with interest
from ....., at the rate of.....

per cent per annum, payable semi-annually, principal and interest payable in United States Gold Coin. Interest, if not paid when due, to be added to the principal and bear interest at the same rate until paid.

.....
.....
.....
....
$.....

This mortgage is also made as security for all other sums now due or that may hereafter become due on account or otherwise from the mortgagor to the mortgagee. It is also agreed that in case the mortgagee should bring suit to foreclose this mortgage, upon filing the complaint he shall be allowed a reasonable attorney fee, the same to be secured by this mortgage.

It is also agreed that if the mortgagor shall fail to make any payment as in said promissory note or in this mortgage provided, or if the mortgagor shall sell the said property herein mortgaged without the written consent of the mortgagee, or remove the same from the County of ....., or, if the mortgagee shall hereinafter deem himself insecure, then in either of the above events the mortgagee may take possession of the said personal property, using all necessary force so to do, and immediately proceed to sell the same in the manner provided by law, and without foreclosure, and from the proceeds may pay the whole amount due the said mortgagee, as specified in said note and mortgage.

Signed and executed in the presence of

.....
..... (Seal.)
..... (Seal.)
..... (Seal.)

State of California, }
County of ..... } ss.

....
....., the mortgagor... in the foregoing mortgage named, and ....., the mortgagee in said mortgage named, being duly sworn, each for himself doth depose and say, that the aforesaid

mortgage is made in good faith and without any design to hinder, delay, or defraud any creditor or creditors.

..... (Seal.)
..... (Seal.)
..... (Seal.)

Subscribed and sworn to before me this .....
day of ....., 190..
.....
Notary Public in and for ..... County, California.

State of California, } ss.
County of ..... }

On this ..... day of ....., 190.., before me, a Notary Public in and for the County of ....., residing therein, duly commissioned and sworn, personally appeared ....., known to me to be the person described in, whose name is subscribed to, and who executed the within instrument, and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said County of ....., the day and year in this certificate first above written.

.....
Notary Public in and for the County of .....,
State of California.
Commission expires ....., 190..

Section 787.—DEED AS SECURITY AND AGREEMENT TO DEED BACK.—When a deed of property is given as security for a note, and a written agreement is given to the maker that the property will be deeded back to him when the note is paid, the transaction constitutes a mortgage, and nothing more. Many lawsuits have occurred, where the holder of such a deed has claimed to be the absolute owner of the property, but the courts have invariably held that it is nothing more than a mortgage, and that the holder must bring a foreclosure suit upon it, just the same as if it were a mortgage in the ordinary terms.

Section 788.—LAWFUL INTEREST.—There is no law against usury in California. A note may specify any rate of interest, and it will be allowed, according to the terms of the note, until the entry of judgment in a suit to collect the note.

Civil Code, Section 1918.

Section 789.—LEGAL RATE WHERE NO INTEREST SPECIFIED.—If a note does not specify any rate, interest is payable on it at the rate of seven per cent per annum after the money becomes due. Thus, if a note is made payable in sixty days, which does not specify any rate of interest, the legal rate of seven per cent is payable on it, beginning with the termination of the sixty days. If part of the note is paid in sixty days, no interest is payable except on so much of it as remains unpaid. In the computation of interest for a period less than a year, 360 days are deemed to constitute a year.

Civil Code, Section 1917.

Section 790.—COMPOUND INTEREST.—The maker of a note may lawfully agree, and may insert in the note, that if the interest is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.

Civil Code, Section 1919.

Section 791.—INTEREST ON JUDGMENT.—Interest is payable on judgments recovered in the courts of this State at the rate of seven per cent per annum, but such interest cannot be compounded in any manner.

Civil Code, Section 1920.

Section 792.—WHO MUST PAY TAXES ON MORTGAGE.—The provision of the Constitution, prohibiting the making of any contract for the mortgagor to pay the taxes, has been repealed. The mortgagee and mortgagor may now

make any agreement they please about the payment of the taxes, and it is lawful to provide in the mortgage that the mortgagor shall pay the taxes on the mortgage.

Section 793.—INSURANCE ON MORTGAGED BUILDINGS.—Either the mortgagor or mortgagee may keep the buildings on the land insured. A mortgage generally provides that the mortgagee may insure the buildings, and the mortgagor must repay the amount paid as premiums, with interest.

Section 794.—ATTORNEY FEES.—There is no lien on mortgaged property for attorney fees, unless the mortgage expressly so provides.

Section 795.—MORTGAGE FOR FUTURE ADVANCES.—A mortgage may be made which will cover and secure not only a sum of money paid in hand, but also future advances of the mortgagee to the mortgagor. Such a mortgage is good, and avoids the necessity of a number of mortgages where money is advanced at different times to the same person.

Section 796.—FIRST AND SECOND MORTGAGES.—A mortgage properly executed and recorded takes precedence of other mortgages subsequently placed on the same property. If the property is sold under foreclosure, the first mortgage must be first paid.

Section 797.—IN WHAT COURT SUIT MUST BE BROUGHT TO FORECLOSE MORTGAGE.—A suit to foreclose a mortgage on personal property can be brought in either the Justice Court or the Superior Court, if neither the amount of the lien nor the value of the property is as much as $300. If the mortgage lien is as much as $300, or if the value of the property mortgaged is $300 or over,

the suit to foreclose the mortgage must be brought in the Superior Court. All suits to foreclose mortgages on real property must be brought in the Superior Court.

Section 798.—WHEN MORTGAGE IS OUTLAWED.—A mortgage is outlawed four years after it becomes due. A suit to foreclose a mortgage must be commenced within four years after it is due, otherwise the suit cannot be maintained.

Code of Civil Procedure, Section 337.

Section 799.—WHAT PROPERTY CAN BE SOLD TO SATISFY MORTGAGE.—Only so much of the mortgaged property can be sold as will bring enough to pay the debt and the costs and expenses of foreclosure. Therefore, neither real estate nor personal property will be sold in one lot, to satisfy a mortgage debt, if it appears that a sale of a part only will bring enough to pay the debt and costs and expenses.

Section 800.—ORDER IN WHICH PROPERTY MUST BE SOLD.—As a general rule, in the sale of mortgaged property under foreclosure, where the mortgage covers both real and personal property, the court in its decree of foreclosure will direct that the personal property be sold first. When the sale is of real property, consisting of several known lots or parcels, they must be sold separately. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the Sheriff must follow such directions.

Code of Civil Procedure, Section 694.

Section 801.—COSTS OF FORECLOSURE.—The costs of foreclosure, including reasonable attorney fees, when provided for in the mortgage, are taxed to the mortgagor,

and must be paid out of the proceeds of the sale of the mortgaged premises.

Section 802.—WHO MAY BUY AT FORECLOSURE SALE.—Any person may buy in the property at a foreclosure sale, except the officer making the sale, or his deputy. The mortgagee may buy in the property, if he will bid higher than other bidders, or if no one else appears to bid.

Section 803.—CERTIFICATE OF SALE.—The officer making the sale gives to the purchaser a certificate of sale, containing a particular description of the real property sold, the price bid for each distinct lot or parcel, the whole price paid, and when the property is subject to redemption the certificate must so state. And when the judgment under which the sale has been made is payable in a specified kind of money or currency, the certificate must specify the same as the money or currency in which redemption may be made. Besides giving to the purchaser the certificate of sale, a duplicate of such certificate must be filed by the officer in the office of the Recorder of the county. If the property sold is personal property, capable of manual delivery, the officer must actually deliver the property to the purchaser upon payment of the purchase price.

Code of Civil Procedure, Sections 698, 700.

Section 804.—ASSIGNMENT OF CERTIFICATE OF SALE.—The certificate of sale received by the purchaser can be sold and assigned by him, and such assignment passes his right and title. The assignment should be recorded, and a notice of the assignment should be served on the officer who made the sale.

Section 805.—WHAT PROPERTY CAN BE REDEEMED.—There is no redemption from sales of personal property. The purchaser acquires an absolute title to

personal property. When a leasehold interest in real property is sold, and the lease has less than two years to run, there is no redemption from the sale. In all other cases the property is subject to redemption.

Code of Civil Procedure, Section 700.

Section 806.—TIME FOR REDEMPTION.—The property sold may be redeemed from the purchaser at any time within twelve months after the sale. The judgment debtor has the whole of the last day in which to redeem.

Code of Civil Procedure, Section 702.

Section 807.—WHO MAY REDEEM.—The persons who may redeem in this State are, the judgment debtor, or his successor in interest, in the whole or any part of the property; and a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to the lien on which the property was sold.

Code of Civil Procedure, Section 701.

Section 808.—HOW TO REDEEM.—The law provides, that the judgment debtor, or other redemptioner, who wishes to redeem, must pay the purchaser the amount of his purchase, with one per cent per month thereon up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid on the property after purchase, and interest on such amount. The purchaser from whom redemption is made may also be a creditor having a lien other than the judgment under which he purchased, and if this lien was prior to the lien of the person who seeks to redeem from him, he must be paid the amount of his lien, with interest, in addition to the amount of his purchase. When property has been once redeemed, it may be again redeemed by another person within sixty days after the last redemption, by paying the amount paid on the last redemption, with two per cent

additional, and any assessment or taxes on the property which the last redemptioner may have paid, and interest; and other redemptioners may in like manner redeem again and again, by making similar payments. Written notice of redemption must be given to the officer making the sale and a duplicate filed with the Recorder of the county. No form of written notice is here given, for the reason that it is not safe for a redemptioner to attempt to fill out a blank notice and use it himself, without the services of a lawyer. Knowing his rights, the redemptioner should seek the services of a competent lawyer, to prepare and serve the necessary notice and make the proper tenders of money in a lawful manner.

Code of Civil Procedure, Sections 702, 703.

Section 809.—THE SHERIFF'S DEED.—If no redemption is made within twelve months after the sale, the purchaser or his assignee is entitled to a Sheriff's deed. If redeemed, whenever sixty days have elapsed, and no other redemption has been made, and the time for redemption has expired, the last redemptioner or his assignee is entitled to a Sheriff's deed. But in all cases the judgment debtor has the entire period of twelve months from the date of the sale to redeem the property. If the debtor redeems, the effect of the sale is terminated, and he is restored to his estate.

Code of Civil Procedure, Section 703.

Section 810.—DEFICIENCY JUDGMENT.—If after the sale of mortgaged property the proceeds are insufficient to pay the debt, and a balance still remains due, a judgment is docketed by the Clerk of the court for such balance against the defendants personally liable for the debt. Such deficiency judgment then becomes a lien against the real estate of the judgment debtor.

Code of Civil Procedure, Section 726.

Section 811.—POSSESSION OF PROPERTY DURING FORECLOSURE PROCEEDINGS.—Generally the mortgagor remains in possession of the mortgaged property during foreclosure proceedings, and it is only under peculiar circumstances that the court will disturb his possession. Where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or where it appears that the conditions of the mortgage have not been performed, and that the property is insufficient to discharge the mortgage debt, the Superior Court has the power to appoint a Receiver, into whose hands the property is placed while the suit is going on.

Code of Civil Procedure, Section 564.

Section 812.—POSSESSION OF REAL PROPERTY DURING TIME FOR REDEMPTION.—It has been shown that there is no redemption of personal property sold under foreclosure, but that a redemption of real property is allowed, and that the time within which redemption may be made is twelve months. During this period of twelve months allowed for redemption the mortgagor has the right to remain in possession of the mortgaged premises, and during this time he is entitled to use the same and take the proceeds thereof.

Section 813.—RIGHT TO RENTS AND PROFITS.—Where the mortgaged property is occupied by a tenant, the purchaser, from the time of the sale until redemption, is entitled to receive the rents or the value of the use and occupation of the property. Where a person other than the judgment debtor redeems, he is entitled to receive the rents until another redemption takes place. But all rents or profits collected by the judgment creditor or by a purchaser must be credited upon and deducted from the redemption money to be paid.

Code of Civil Procedure, Section 707.

Section 814.—WHO MUST PAY FOR IMPROVEMENTS MADE DURING FORECLOSURE PROCEEDINGS.—Sometimes the mortgagee gets possession of the premises, either by consent or by force, and succeeds in retaining such possession during foreclosure proceedings. Then the question arises, Who is to pay for improvements to the property made by the mortgagee in possession? In California the law is, that where a mortgagee is in possession, and makes improvements without the consent of the mortgagor, he will not be allowed anything for them further than is proper to keep the premises in necessary repair; therefore, if a mortgagee in possession should build a new house on the land, or clear uncultivated land and put it into a state of cultivation, or make any other improvements not necessary to keep the premises in repair, he must stand the expense himself, and cannot recover from the mortgagor or any redemptioner the cost of such improvements. The reason for this rule is, that while unreasonable improvements may be of benefit to the estate, yet the mortgagee has no right to impose them upon the owner and thus increase the burden of redeeming.

Section 815.—HOW TO COLLECT A NOTE WHEN MAKER IS DEAD.—If the maker of a note dies before it becomes due, the holder may collect it from the maker's estate. If the estate is of a value less than $10,000, a claim for the amount due on the note must be presented to the executor or administrator within four months after the first publication of notice to creditors. If the estate is of a value of $10,000 or over, a claim for the amount due on the note must be presented to the executor or administrator within ten months after the first publication of notice to creditors. If the executor or administrator allows the claim, it is then presented to the Judge of the Probate Court for his allowance, and when allowed it is filed in the Clerk's office, and becomes an acknowledged debt of the estate,

which the executor or administrator will be bound to pay in the course of the administration of the estate. When a claim is rejected, either by the executor or administrator, or by the Judge of the court, the holder must bring suit against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim will be forever barred.

Code of Civil Procedure, Section 1498.

Section 816.—EXCUSE FOR NOT PRESENTING CLAIM IN TIME.—When the claimant was out of the State during the publication of notice to creditors, and makes affidavit to the fact, and that he had no notice, this will be an excuse for not presenting his claim against an estate in time, and he will be allowed to present the claim to the executor or administrator at any time before a decree of distribution of the estate is entered.

Code of Civil Procedure, Section 1493.

Section 817.—FORECLOSURE OF MORTGAGE WHEN THE MAKER IS DEAD.—A mortgage may be foreclosed, even though the maker is dead, by a suit against the executor or administrator of his estate. But a claim against the estate must be presented to the executor or administrator if the mortgagee wishes to recover attorney fees. If he does not present his claim for the amount due, he may still foreclose his mortgage, but he cannot recover fees paid to his attorney.

Section 818.—FORECLOSURE OF MORTGAGE PAYABLE IN INSTALLMENTS.—If the debt for which the mortgage is held is not all due, as where a note is payable in installments, and foreclosure is had for failure to pay an installment due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for

principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid; but where this is done there will be a rebate of interest on installments not yet due.

Code of Civil Procedure, Section 728.

Section 819.—COLLECTION OF LOST OR DESTROYED NOTE.—The amount due on a note may be collected, notwithstanding the note may have been lost or destroyed. If the note is lost or destroyed, then the holder must give a bond, executed by himself and two sufficient sureties, to indemnify the party paying the note against any lawful claim which any other person may make upon it.

Civil Code, Section 3137.

Section 820.—NOTE MADE BY PARTNERS.—A note may be made by partners for the debts of the firm, or in the usual course of business of the firm, for goods, or advancements, or as security for a loan to the firm. One partner may execute the note in the firm name, and all the partners will be bound by it, for each partner has an equal right, so far as third parties are concerned, to bind the firm by acts and conduct in the usual course of its business.

Section 821.—LIABILITY OF PARTNERS ON PARTNERSHIP NOTE.—Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners. Therefore, a promissory note, executed for the firm, makes each partner liable to pay the note. The partnership property may be taken for the payment of the debt, and the property of each partner may also be taken, if the property of the firm is not sufficient.

Section 821a.—ASSIGNMENT OF MORTGAGE.—A mortgage may be assigned, and the assignee will then have

the same rights as the original mortgagee. The assignment must be in writing, and must be signed and acknowledged by the person making the assignment. The following is a good form of assignment of mortgage, which must be acknowledged in the same manner as a mortgage is acknowledged:—

ASSIGNMENT OF MORTGAGE.

Know All Men by These Presents:—That ....., of the County of ....., State of California, the party of the first part, for and in consideration of the sum of ..... Dollars, Gold Coin of the United States of America, to him in hand paid by ..... of the County of ....., State of California, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, a certain indenture of mortgage bearing date the ..... day of ....., 190.., made and executed by ..... to the said party of the first part, and recorded in the office of the County Recorder of the County of ....., State of California, in book ..... of mortgages, page ...., on the ..... day of ....., 190.., at ..... minutes past ..... o'clock .... M.

Together with the promissory note therein described, and the money due and to grow due thereon, with the interest.

And the said party of the first part does hereby make, constitute, and appoint the said party of the second part his true and lawful attorney, irrevocable, in his name or otherwise, but at the proper costs and charges of the said party of the second part, to have, use, and take all lawful ways and means for the recovery of the said money and interest; and in case of payment to discharge the same as fully as the said party of the first part might or could do if these presents were not made.

In witness whereof the said party of the first part has hereunto set his hand and seal this ..... day of ....., 190..

..... (Seal.)

PART IV

ATTACHMENTS AND EXECUTIONS

Attachments

Section 822.—ATTACHMENT OF DEBTOR'S PROPERTY.—A creditor, in a suit to collect a bill, account, or promissory note not secured by mortgage, can attach the property of his debtor. The court in which the suit is brought will issue the writ of attachment, to be placed in the hands of an officer for service, at the time the summons is issued in the suit, or at any time afterward before judgment is given. Always, the plaintiff in the suit must give bond, usually in the sum of two hundred dollars, when the suit is in the Superior Court, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the bond. The bond must be signed by two or more sureties. Upon the filing of the bond the Clerk of the Superior Court, if the suit is in that court, or the Justice of the Peace, if the suit is before a Justice, will issue a writ of attachment. The bond in a Justice Court is usually in the sum of fifty dollars. When issued, the writ of attachment is placed in the hands of the Sheriff or a Constable for service.

Code of Civil Procedure, Sections 538, 539, 866. 867.

Section 823.—WHAT PROPERTY CAN BE ATTACHED.—Real estate belonging to the debtor, whether standing upon the records of the county in his name or in the name of another; personal property of all kinds; corporation stocks or shares; money owing to the debtor

by any person,—all these may be attached as security for the payment of the judgment which the creditor expects to obtain when he sues the debtor to collect the amount due from him.

Section 824.—WHAT PROPERTY IS EXEMPT FROM ATTACHMENT OR EXECUTION.—The law of California singles out certain property of the debtor, and says that it shall not be taken for a debt. This it does to protect the unfortunate and the improvident, and to secure to the family of the debtor provision at least for temporary wants. Therefore, the law states that certain property of the debtor shall be exempt, no matter how pressing his debts or how eager his creditors may be. An attachment cannot hold, nor can a sale on execution be had, of any of the following property if the owner objects: (1)—Chairs, tables, desks, and books, to the value of $200, belonging to the judgment debtor. (2)—Necessary household, table, and kitchen furniture, belonging to the judgment debtor, including one sewing-machine, stove, stovepipes, and furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings and drawings, drawn or painted by any member of the family, and family portraits and their necessary frames, provisions and fuel actually provided for individual or family use sufficient for three months, and three cows and their sucking calves, four hogs with their sucking pigs, and food for such cows and hogs for one month; also one piano, one shotgun, and one rifle. (3)—The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also, two oxen, or two horses, or two mules, and their harness, one cart or buggy and two wagons, and food for such oxen, horses, or mules for one month; also, all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months not exceeding in value the sum of two hundred dollars; 75 bee-hives;

and one horse and vehicle belonging to any person who is maimed and crippled, if same is necessary in his business. (4)—The tools or implements of a mechanic or artisan, necessary to carry on his trade; the notarial seal, records, and office furniture of a Notary Public; the instruments and chest of a surgeon, physician, surveyor, or dentist, necessary to the exercise of his profession, with his professional library, and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school-teachers, and music teachers, and their necessary office furniture, including one safe and one typewriter; the musical instruments of music teachers actually used by them in giving instructions; all the indexes, abstracts, books, papers, maps, and office furniture of a searcher of records, necessary to be used in his profession; the typewriters, or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also, one bicycle, when the same is used by its owner for the purpose of carrying on his regular business, or when the same is used for the purpose of transporting the owner to and from his place of business. (5)—The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances, necessary for carrying on any mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules, or oxen, with their harness, and food for such horses, mules, or oxen for one month, when necessary to be used on any whim, windlass, derrick, car, pump, or hoisting gear; and also his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars. (6)—Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse,

with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business; with food for such oxen, horses, or mules, for one month. (7)—One fishing boat and net, not exceeding the total value of five hundred dollars, the property of any fisherman, by the lawful use of which he earns his livelihood. (8)—Poultry not exceeding in value seventy-five dollars. (9)—The wages and earnings of all seamen, sea-going fishermen, and sealers, not exceeding three hundred dollars, regardless of where or when earned, and in addition to all other exemptions otherwise provided by any law. (10)—The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family, residing in this State, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessaries of life, or have been incurred at a time when the debtor had no family residing in this State supported in whole or in part by his labor, the one-half of such earnings above mentioned is nevertheless subject to attachment or execution, to satisfy debts so incurred. (11)—The shares held by a member of an incorporated homestead association, not exceeding in value one thousand dollars, if the person holding the shares is not the owner of a homestead under the laws of this State. (12)—All the nautical instruments and wearing apparel of any master, officer, or seaman of any steamer or other vessel. (13)—All fire engines, hooks, and ladders, with the carts, trucks, and carriages, hose, buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this State. (14)—All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor. (15)—All court-houses,

jails, public offices and buildings, lots, grounds, and personal property; the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to jails and public offices of any county of this State; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament, or public use, or for the use of any fire or military company organized under the laws of this State. (16)—All material not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration, or repair of any building, mining claim, or other improvements, as long as in good faith the same is about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement. (17)—All machinery, tools, and implements necessary in and for boring, sinking, putting down, and constructing surface or artesian wells, also, the engines necessary for operating such machinery, implements, tools, etc.; also, all trucks necessary for the transportation of such machinery, tools, implements, engines, etc.; provided, that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars. (18)—All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, and if they exceed that sum, a like exemption exists, bearing the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that five hundred dollars bears to the whole annual premiums paid. (19)—Shares of stock in any building and loan association to the value of one thousand dollars. No article, however, or species of property mentioned above, is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage or other lien

thereon. (20)—A United States homestead cannot be attached or sold under execution for any debt contracted prior to proving up and obtaining title to the land. (21)—All money received by any person, a resident of the State, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him.

Act of the Legislature, in effect May 22, 1907.

Section 825.—MORTGAGED PROPERTY MAY BE ATTACHED.—Property, real or personal, which is mortgaged to another person, may be attached in a suit by a creditor, but the lien of the attachment is subject to the mortgage.

Section 826.—CREDITOR LIABLE FOR UNLAWFUL ATTACHMENT.—A creditor who makes an unlawful attachment, or causes it to be made, will be liable in damages for all injury done to the person whose property is attached. If the holder of an obligation sues upon it, and causes an attachment to be issued and placed upon property of the debtor, as upon household furniture, or farming utensils, or horses, or cows, exempt by law from execution, he will be liable for all damages sustained by the unlawful seizure. His sureties on the attachment bond are liable to the extent of their bonds only, but he is liable to the full extent of the injury. The debtor may have the attachment released, upon the ground that the property attached is exempt, and bring a suit for damages against the creditor and his bondsmen.

Section 827.—CREDITOR ATTACHING PERSONAL PROPERTY MUST PAY MORTGAGE.—It has already been shown that mortgaged property may be attached by a creditor of the owner, subject to the mortgage. Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of a mortgagor:

but before the property can be taken, the officer levying the attachment or execution must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the money with the County Clerk or Treasurer, payable to the order of the mortgagee.

Civil Code, Section 2969.

Section 828.—GARNISHMENT.—There are certain effects of a debtor which cannot be seized and taken into the custody of the officer, but which may still be rendered liable to the payment of the debt, such as money owing to the debtor by a third person, or property in the hands of a third person belonging to the debtor. In a suit by the creditor against the debtor, the officer serves a notice upon the person owing the debtor, or having property of the debtor in his hands, that such property is attached, and this is called garnishment. The person upon whom the notice is served is called the garnishee. Thereafter, he cannot pay his debt to the defendant, nor deliver the property to him, but must hold it to await the result of the suit. In this State, when required by the officer the garnishee must make a statement of the amount owing by him to the defendant, or showing the character and description of the property in his hands belonging to the defendant.

Section 829.—FOR WHAT PROPERTY GARNISHEE LIABLE.—The garnishee will be held liable for all personal property in his hands belonging to the defendant which is capable of being seized and sold upon execution. The garnishee will be liable for money in his hands belonging to the defendant, and a garnishment may be levied upon a bank or corporation, as well as upon an individual. The property must be in the actual possession of the garnishee, or within his control, so that he may be able to turn it over to the officer on execution.

Section 830.—MONEY DUE AS SALARY TO PUBLIC OFFICER.—The salary of a public officer can be attached or garnished. When a judgment is obtained against a public officer, a transcript of it may be filed with the State Controller or County or City Auditor, and so much of the officer's salary as is not exempt from execution shall be then paid over to the judgment debtor. (Statutes of 1903, page 362.) A decision has been made by the Supreme Court in a test case under the statute of 1903. A suit was brought in San Francisco to compel the Auditor to allow the salary of a public officer, but he refused on the ground that a part of the money had been attached under the new law. The Supreme Court decided that the law is constitutional, and that it will stand good as to all public officers and employees created or provided for by the Legislature. Therefore, when the Auditor pays the money due, from the State, or city, or county, into court, so much as is not exempt from execution must be paid to the judgment creditor. (Decided by the Supreme Court of California, in the case of Ruperich vs. Baehr, which decision is printed in Volume 27 of California Decisions, No. 1465, page 359.)

Section 831.—MONEY IN THE HANDS OF THE LAW.—Money in the hands of the law, as money in the hands of a sheriff, or constable, or money deposited with a clerk of court to wait the determination of a suit, or money in the hands of a Receiver appointed by the court, cannot be taken by garnishment or attachment; for all such property is in the custody of the law, and until the law has done with it, no interference from any other source will be tolerated or allowed.

Section 832.—ATTACHMENT OF PARTNERSHIP PROPERTY.—Partnership property may always be attached for partnership debts. But a more serious question arises, where one partner owes debts and is sued by his

creditor, outside of the partnership business. The decisions of the courts in different States have not been uniform, but in California the law appears to be settled, that a creditor of one partner may have an attachment levied upon the partnership property. The sheriff must take the whole property into his possession, but he cannot sell on execution the interests of both partners; he can only sell under the execution the interest of the partner against whom the judgment was obtained.

Section 833.—DISSOLUTION OF ATTACHMENT.—If an attachment has been improperly or irregularly issued, by the court in which the suit was brought, it will be discharged on motion of the defendant. If an attachment is issued in a case where the law does not provide for an attachment, or if the plaintiff's complaint does not state a cause of action, or if other necessary papers essential to obtain a Writ of Attachment are fatally defective, the attachment will be held to be improperly or irregularly issued and the defendant will have a right to ask for the discharge of the attachment.

Section 834.—BOND FOR RELEASE OF ATTACHED PROPERTY.—The defendant in a suit, whose property is attached, may have the attachment released by giving a bond, in a sum to be fixed by the court, with at least two sureties, as security that the property released will be re-delivered to the proper officer if the plaintiff recover a judgment in the action; or that, if the property is not turned over to the officer, that the sureties will pay to the plaintiff the full value of the property released.

Code of Civil Procedure, Section 555.

Section 834a.—LIEN OF ATTACHMENT.—The attachment will be a lien upon all real property attached for a period of three years after date of levy, unless sooner released or discharged by dismissal of the suit or by entry of

judgment. The time may be extended, by the court, upon motion made not less than five nor more than sixty days before the expiration of the three years.

Act of the Legislature, approved March 25, 1909.

Judgments and Executions

Section 835.—JUDGMENTS.—Whether any property is attached or not, a judgment may be obtained for the amount due, and costs of suit, and upon the judgment an execution is issued from the court in which suit is brought, directed to the Sheriff, and commanding that officer to sell enough of the debtor's property to pay the debt. All property not exempt from execution may be sold by the Sheriff and applied to the payment of the judgment. All sales of property under execution are made at public auction to the highest bidder.

Section 836.—JUDGMENT A LIEN ON REAL PROPERTY.—When a judgment is rendered in a suit in the Superior Court, the Clerk of the Court enters the judgment in his official records, and makes up what is called a Judgment Roll, attaching together and filing the pleadings and certain other papers, for that purpose. Immediately after filing the Judgment Roll, the Clerk of the Court makes the proper entry of the judgment in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time or which he may afterward acquire, until the lien ceases.

Code of Civil Procedure, Sections 670, 671.

Section 837.—HOW LONG JUDGMENT LIEN CONTINUES.—The lien of a judgment docketed in the Superior Court continues for five years, on real property of the judgment debtor in the county.

Section 838.—JUDGMENT LIEN ON PROPERTY IN ANOTHER COUNTY.—A transcript of the original docket of the judgment, certified by the Clerk, may be filed with the Recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real property of the judgment debtor not exempt from execution in such other county, and this lien, unless the judgment be previously satisfied, continues for two years.

Code of Civil Procedure, Section 674.

Section 839.—HOW JUSTICE COURT JUDGMENT IS MADE LIEN ON REAL PROPERTY.—Reference has been made in the preceding Sections to the lien of judgments obtained in the Superior Court. But a lien upon the real property of the debtor may also be secured on a Justice Court judgment, by following certain requirements of the law of California. A person obtaining a judgment in the Justice Court, if he wishes to make it a lien upon the real property of his debtor, must ask the Justice to give him an abstract of the judgment, which it is the duty of the Justice to furnish on demand. This abstract of the judgment must be filed in the office of the Recorder of the county in which the land of the debtor is situated, and when so filed, and from the time of filing, the judgment becomes a lien on such property. This lien continues for two years, unless the judgment be previously satisfied. A judgment rendered in a Justice's Court creates no lien upon any lands of the defendant, unless the abstract above mentioned is filed in the office of the Recorder of the county in which the lands are situated.

Code of Civil Procedure, Sections 897, 900.

Section 840.—TIME WITHIN WHICH EXECUTION MAY ISSUE.—The party in whose favor judgment is given may, at any time within five years after the judgment is entered, have a writ of execution issued for its enforcement.

Section 841.—EXEMPTION MUST BE CLAIMED BY DEBTOR.—While the law exempts certain property of a judgment debtor from execution and forced sale, such exemption is a personal privilege, which may be waived by the debtor; and a failure to claim the property as exempt, when levied on to satisfy a judgment against him, within a reasonable time thereafter, is a waiver of the exemption right; and the officer selling exempt property without such claim of exemption is not liable for its value.

PART V

LAST WILLS AND TESTAMENTS

Section 842.—MAKING A WILL.—The law of California designs to encourage the making of wills, and whenever the last will and testament of a deceased person—who in his lifetime thus endeavored to direct the disposition of his property when he should have done with the business of this world—whenever such an instrument has come before the Supreme Court of this State, and has become the subject of attack by dissatisfied relatives, the law relative to the making of wills has always been liberally construed, with a sincere desire to carry out the intentions of the testator. The courts of late years have come to look with more or less suspicion upon the many attempts to break wills made in this State. Disgraceful scandals have been the aftermath of so many will contests, and bribery and perjury of witnesses such frequent circumstances, that the Supreme Court alone has been able to stem the tide of corruption which has followed many of California's rich men to the grave. Now, the frequent decisions of the Supreme Court in favor of the validity of wills, and the fearless rulings of some Judges of the Superior Court, setting aside verdicts of juries when evidently induced by passion and prejudice, are having a good effect. The number of will contests may not be decreased, as long as credulous clients have money to pay eager lawyers; but the people of California may at all events feel greater security in the irrevocable character of last wills and testaments. And whether a person be rich or poor, whether the estate disposed of by will be large or small, it is the intention of the law of California that the solemn act thus expressed shall be protected and enforced.

Section 843.—WHO MAY MAKE A WILL.—Every person in California over the age of 18 years, and of sound mind, may make a last will, and thus dispose of all his estate, real and personal.

Section 844.—WILL OF MARRIED WOMAN.—A married woman may dispose of all her separate property by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. The will of a married woman must be executed and proved in the same manner as other wills.

Civil Code, Section 1273.

Section 845.—WHAT MAY BE DISPOSED OF BY WILL.—Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin, if there were no will, might succeed to, may be disposed of by last will; provided, the husband can only dispose of one-half of the community property by his will, the other half belonging to his wife at his death and not being subject to his will; and provided, also, that the wife can only dispose of her separate property by her will, or such of the community property as may have been set aside to her by the judgment of a court for her support and maintenance.

Civil Code, Sections 1401, 1402.

Section 846.—WHO MAY TAKE BY WILL.—Any person may take property by will, except the artificial persons known as corporations. A testamentary disposition of property cannot in this State be made to any corporation, except such as are formed for scientific, literary, or solely educational or hospital purposes; and except that property may lawfully be willed to charitable or benevolent societies or corporations for use by them in the furtherance of their designs. But no estate, real or personal, can be lawfully left to any charitable or benevolent society or

corporation, or to any person or persons in trust for charitable uses, unless the will is executed at least thirty days before the death of the testator; and the law provides that bequests for charitable uses must not collectively exceed one-third of the estate of the testator leaving legal heirs.

Civil Code, Sections 1275, 1313.

Section 847.—KINDS OF WILLS.—There are three kinds of wills recognized by the law of California—a nuncupative will; an olographic will; and a will signed by the testator and by attesting witnesses.

Section 848.—NUNCUPATIVE WILLS.—The kind of will called "nuncupative" is only made under peculiar and extraordinary circumstances. A person in actual military service in the field, or doing duty on a ship at sea, and in actual contemplation, fear, or peril of death, or in expectation of immediate death from an injury received the same day, may make a nuncupative will. A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities. To make a nuncupative will valid, and to entitle it to be admitted to probate, it must further appear that the estate bequeathed does not exceed in value the sum of one thousand dollars; and two witnesses who were present at the making of the will must prove it, and one of the witnesses must have been asked by the testator at the time to be a witness that such was his will.

Section 849.—OLOGRAPHIC WILLS.—An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this State, and need not be witnessed. The law must be strictly followed in making such a will. It may be written on any kind of paper, and it is not required to be in any particular form; but it must be entirely in the testator's handwriting. If a person, intending to make an olographic will, dictates to

some one who writes the body of it for him and then signs it himself, it is not a valid will, for the law expressly declares that he must write it all himself. So, if a person uses a blank form, and fills out the blanks in his own handwriting, and signs his name, yet the law has not been complied with, and the instrument is void as a will. Every word and every figure in it, to be a valid olographic will, must be in the handwriting of the person making it. If any part of it is in the handwriting of any other person, or if any part of it is printed, it will be illegal and invalid. In one case in California it was decided that nothing more than the figures "1880" in print, after "April 1" in the testator's handwriting, made the document illegal as an olographic will. Not only must the document be entirely in the handwriting of the person making an olographic will, but it must always be dated. If otherwise lawfully made, that is, written and signed by the testator himself, but with the date omitted, the paper is invalid as a will. As before stated, a will of this kind need not be in any particular form. It may even be in the form of a letter, and if it appears that the writer intended to thus make a testamentary disposition of his property, it will be considered as his last will and testament. When a will is thus lawfully made, entirely written, dated, and signed by the hand of the testator himself, it constitutes the most satisfactory manner in which a will can be made, and is less liable to the attacks of will-breaking lawyers than is a formal will, written and executed under the supervision of a legal adviser. For olographic wills are usually brief, whereas a will in the handwriting of a lawyer is apt to have its length gauged by the size of the estate or the amount of the fee; and, too, an olographic will is free from the technical terms and legal phrases which never cease to stir up controversies in the courts. For these reasons, an olographic will, when made by a person of ordinary intelligence, is the kind to be preferred.

Civil Code, Section 1277.

Section 850.—FORM OF OLOGRAPHIC WILL.—The following is a form of olographic will, which meets the requirements of the law. The date, names, amounts, and the signature must be filled in, and the whole written by the maker of the will alone:—

....., Cal., ..., 190..

I declare this to be my last will and testament. I give and bequeath to ..... the sum of ..... Dollars; I give and bequeath to ..... the sum of ..... Dollars; I give and bequeath to ..... and ..... all the residue of my property, of whatever kind and wherever situated, share and share alike.

.....

The foregoing form will be as good as any other; and, indeed, any form is good as an olographic will, if the intention of the writer to make it his will appears in it, and the disposition which he desires to make of his property.

Section 851.—WILL ATTESTED BY WITNESSES.—A will which is not in the handwriting of the maker must be executed and attested as follows: (1) It must be subscribed at the end by the testator himself, or some person in his presence and by his direction must subscribe his name to it; (2) The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the maker to them to have been made by him or by his authority; (3) The maker must, at the time of subscribing or acknowledging the will, declare to the attesting witnesses that the instrument is his will; (4) There must be two attesting witnesses to a will, and each of them must sign the will as a witness, at the end of it, at the testator's request and in his presence. The testator must either sign his name at the end of the will, or have it signed by some one in his presence and at his direction.

Civil Code, Section 1276.

Section 852.—GIFTS TO SUBSCRIBING WITNESSES.—All legacies and gifts of any kind, made or

given in any will to a subscribing witness, are void, unless there are two other competent subscribing witnesses to the will.

Civil Code, Section 1282.

Section 853.—HOW A WILL IS REVOKED.—The law declares what acts work the revocation of a will in this State.

A will is revoked by a later will, declaring the revocation of the prior one.

A will is revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and purpose of revoking it, by the testator himself, or by some person in his presence and by his direction.

When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such cancellation or destruction, must be proved by two witnesses.

A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

Civil Code, Sections 1292, 1293, 1296.

Section 854.—REVOCATION BY MARRIAGE.—If after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or mentioned in the will so as to show an intention not to make provision for the child.

If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or mentioned in the will so as to show an intention not to make provision for her.

A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

Civil Code, Sections 1298, 1299, 1300.

Section 855.—SHARE OF CHILD BORN AFTER THE WILL.—Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

Civil Code, Section 1306.

Section 856.—OMISSION TO PROVIDE FOR CHILDREN.—When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, the law declares that such child or the issue of such child must have the same share in the estate of the testator as if he had died intestate. But the law also provides that a child who has had his share of the estate advanced to him during the lifetime of the testator, even though not mentioned in the will, is not entitled to any more.

Civil Code, Sections 1307, 1309.

Section 857.—CHILDREN OF DEVISEE.—When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee would have done had he survived the testator.

Civil Code, Section 1310.

Section 858.—WHEN WILL TAKES EFFECT.—A will takes effect at the testator's death. It can have no effect to pass any title before his death.

Section 859.—WHEN LEGACIES ARE DUE.—Legacies are due to those entitled to them at the expiration of one year after the testator's death.

Section 860.—INTEREST ON LEGACIES.—Ordinary legacies bear interest from the time when they become due. A legacy to the testator's widow bears interest from the date of his death.

Section 861.—GROUNDS FOR CONTEST OF WILL.—The law specifies, as the grounds for the contest of a will, duress, menace, fraud, or undue influence; and, also, it is a common ground for the contest of a will, that the testator was not of sound mind. If advantage is taken of an old and feeble person, and the facts are misrepresented or concealed, or threats or fraudulent persuasions resorted to, by which a testator is fraudulently induced to exclude from his will the natural object of his bounty, whom he would otherwise have remembered and provided for, the law will interfere on behalf of the injured party and set the will aside. Yet it will require clear and convincing proof to set aside a will upon these grounds.

By far the larger number of will contests are made upon the ground that the testator was not of sound and disposing mind, but on the contrary was afflicted with insanity. On this subject it may be said, that if there had not been so many expert witnesses the world would never have heard of so many forms of insanity. Expert witnesses on insanity are ever ready to swear on either side of a will contest, as they happen to be first employed, and to frame their theories according to their interests. The Supreme Court of California has announced, time and time again, its own distrust of expert testimony, and has endeavored to be guided by the rules of reason and common sense in its disposition of will cases. The facts must be recognized, that there is no satisfactory definition of insanity, either in or out of the medical profession; that no man can truly mark

the dividing line between sanity and insanity; that a person may be exceedingly eccentric, and yet not be at all insane; that by a "sound mind" is meant only that a person, in order to make a valid will, must be of sufficient understanding to know the character and extent of his property, to know and recollect the natural objects of his bounty, to know to whom he wishes to leave his property, and to appreciate and know the character of his act when he makes his will. If this is the state of his mind, no eccentricity of speech or conduct, and no impairment of mental power, will have any effect to invalidate the solemn act of disposing of his estate by last will and testament.

Section 861a.—ADMINISTRATION OF ESTATES.— For the law as to settlement of estates in court, see the last subject in the book, "Administration of Estates."

Sections Omitted

Sections 862 to 871, inclusive—Sections 862 to 871, inclusive, being the subject of "Estray Law of California," is omitted from the Eighth Edition, and other subjects added of greater value and more general interest.

PART VI

CORPORATIONS IN CALIFORNIA

Section 872.—NATURE OF CORPORATIONS.—The definition of corporations given by the law of California is, "A corporation is a creature of the law, having certain powers and duties of a natural person." Unlike a natural person, who may act in business affairs as his individual will may dictate, a corporation can only act through its officers in the manner prescribed by the law creating it. The nature of a corporation is peculiar in another respect. While the rights and privileges of a natural person, considered as such, will terminate by his death, the rights and privileges of the corporation do not end, or vary, upon the death or change of any of the individual members. Judge Kent, the eminent lecturer on law, has said that the object of a corporation is "to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law but as one moral person, capable, under an artificial form, of taking and conveying property, contracting debts and duties, and of enjoying a variety of civil and political rights."

Civil Code, Section 283.

Section 873.—FOR WHAT PURPOSE CORPORATIONS MAY BE FORMED.—In California, corporations may be formed for any purpose for which individuals may lawfully associate themselves. And as individuals may enter into any business transactions not prohibited by law.

so a corporation may be formed for the purpose of carrying on any lawful business, of any kind whatever.

Civil Code, Section 286.

Section 874.—WHO MAY FORM A CORPORATION.—The law places but two restrictions upon the formation of corporations, respecting the persons who may organize them. At least three persons must join in the formation of a corporation, or as many more as may be desired; and, whether a corporation be formed by three persons, or a number more than three, a majority of such persons must be residents of the State of California. Foreign corporations may do business in the State, but a corporation cannot be formed here unless a majority of the persons forming it are residents of the State.

Civil Code, Section 285; Statutes of 1905, page 502.

Section 875.—ARTICLES OF INCORPORATION.—The instrument by which a corporation is formed is called "Articles of Incorporation." Articles of Incorporation must be prepared, setting forth: (1) The name of the corporation; (2) the purpose for which it is formed; (3) the place where its principal business is to be transacted; (4) the term for which the corporation is to exist; (5) the number of its Directors; (6) the amount of its capital stock, if any, and the number of shares into which it is divided; (7) the amount actually subscribed, and by whom.

Civil Code, Sections 289, 290.

Section 876.—FORM OF ARTICLES OF INCORPORATION.—The following is a form of Articles of Incorporation, which meets the requirements of the law:—

Articles of Incorporation.

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation, under the laws of the State of California; and we hereby certify,

First—That the name of said corporation is .....

....

(Here insert the name selected for the corporation.)

....

Second—That the purposes for which it is formed are to carry on the business of .....

....

(Here insert the purposes of the corporation.)

....

Third—That the place where its principal business is to be transacted is the city of .....

....

(Here insert the name of the place.)

....

Fourth—That the term for which said corporation is to exist is .....

....

(Here insert number of years.)

....

years from and after the date of its incorporation.

Fifth—That the number of Directors of said corporation shall be .....

(Here insert number of Directors agreed upon.)

....

and that the names and residence of the Directors who are appointed for the first year are:—

Names. Residence.

....

(Here insert names and residence of Directors.)

....

....

....

....

Sixth—That the amount of the capital stock of said corporation shall be ..... Dollars, divided into ..... thousand shares, of the par value of ..... Dollars each.

Seventh—That the amount of said capital stock which has been actually subscribed is ..... Dollars, and the following are the names of the persons by whom the same has been subscribed, to-wit:—

Subscriber. Number of Shares. Amount.

....

....

(Here insert names of subscribers, number of shares subscribed for, and amount of each subscription.)

....

....

In witness whereof, we have hereunto set our hands and seals, this ..... day of ....., 190..

.....

.....

.....

.....

.....

STATE OF CALIFORNIA, }
County of ..... } ss.

On this ..... day of ....., in the year one thousand nine hundred and ....., before me, ..., a Notary Public in and for said county, residing therein, duly commissioned and sworn, personally appeared

....., ...,

....., ...,

and ....., personally known to me to be the persons whose names are subscribed to the within instrument, and they each duly acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the County of ....., the day and year in this certificate first above written.

.....

Notary Public in and for the County of ....., State of California.

Commission expires ....., 190..

Section 877.—NUMBER OF SIGNERS.—The Articles of Incorporation must be signed by at least three persons, a majority of whom must be residents of California, and each of whom must make an acknowledgment before a Notary or other officer authorized to take acknowledgments.

Civil Code, Section 292; Statutes of 1905, page 502.

Section 878.—FILING OF ARTICLES OF INCORPORATION.—The Articles of Incorporation, when

prepared and signed and acknowledged, must be filed in the office of the County Clerk of the county in which the principal place of business is located; and a copy, certified by the County Clerk, must be filed in the office of the Secretary of State at Sacramento.

Section 879.—CERTIFICATE OF SECRETARY OF STATE.—Upon receiving and filing in his office the certified copy of the Articles of Incorporation filed with the County Clerk, the Secretary of State issues to the corporation, over the great seal of the State of California, a certificate that a copy of the Articles containing the required statement of facts has been filed in his office; and from the time when this certificate is issued the persons signing the Articles of Incorporation, and their associates and successors, become and are created a corporation, under the name chosen by them.

Civil Code, Section 296.

Section 880.—NAME OF CORPORATION MUST BE NEW.—The name selected by the incorporators must be new; that is, it must not have the same name as any other corporation before organized in this State; nor can the name selected so closely resemble the name of any other existing corporation that it will tend to deceive; and if Articles of Incorporation are sent to the Secretary of State which contain the same name as an existing corporation, or a name so closely resembling it as tends to deceive the public, it will be his duty under the law to refuse to file the Articles or issue his certificate.

Statutes of 1901, page 629.

Section 881.—COST OF INCORPORATING.—The fees for forming a corporation, to be paid the Secretary of State, are as follows: (1) For filing Articles of Incorporation, if the capital stock amounts to twenty-five thousand dollars or less, fifteen dollars; if the capital stock amounts to over

twenty-five thousand dollars, and not over seventy-five thousand dollars, twenty-five dollars; if the capital stock amounts to over seventy-five thousand dollars, and not over two hundred thousand dollars, fifty dollars; if the capital stock amounts to over two hundred thousand dollars, and not over five hundred thousand dollars, seventy-five dollars; if the capital stock is over five hundred thousand dollars, and not over one million dollars, one hundred dollars; if the capital stock is over one million dollars, fifty dollars additional for every five hundred thousand dollars or fraction thereof of capital stock over and above one million dollars. (2) For filing Articles of Incorporation without capital stock, except cooperative associations, five dollars. (3) For filing Articles of Incorporation of cooperative associations, fifteen dollars. (4) For recording Articles of incorporation, twenty cents per folio. (5) For issuing certificate of incorporation, three dollars.

Statutes of 1903, page 27.

Section 882.—LIMIT OF CORPORATE EXISTENCE.—A corporation, being a creature of the law, can only continue for the length of time which the law prescribes. The law of California provides that the limit of time for which a corporation can be formed in this State is fifty years. The Articles of Incorporation may fix a period of existence less than fifty years, but cannot provide for a longer period.

Civil Code, Section 296.

Section 883.—EXTENDING CORPORATE EXISTENCE.—Every corporation formed for a period less than fifty years may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension may be made at a meeting of the stockholders or members, called by the directors expressly for considering the subject, if voted by stockholders representing two-thirds of the capital stock; or by two-thirds of the

members; or may be made upon the written assent of that number of stockholders or members. A certificate of the proceedings of the meeting must be signed by the chairman and the secretary of the meeting and a majority of the directors, and be filed in the office of the County Clerk where the original Articles of Incorporation were filed, and a certified copy must be filed in the office of the Secretary of State, and thereupon the term of the corporation is extended for the specified period.

Section 884.—AMENDMENT OF ARTICLES OF INCORPORATION.—If a corporation is formed, and it should be discovered that some important and material provision respecting the purposes of the corporation was omitted from the Articles of Incorporation, or that the Articles as filed did not contain all the statements of fact required by the law, amended Articles may be filed containing the omitted matters. In order to amend the Articles of Incorporation, however, the amendment must be ordered by a majority vote of the Board of Directors and must be assented to by the stockholders representing two-thirds of the subscribed capital stock, such assent being given either by vote at a meeting or by writing. A copy of the Articles of Incorporation, as amended, must then be filed in the office where the original was filed. The law declares that the time of the existence of a corporation cannot be extended by amendment of its Articles of Incorporation.

Statutes of 1903, page 411.

Section 885.—CHANGE OF NAME.—A corporation may change its name. If a corporation desires to change its name, a petition asking for the change of name may be filed in the Superior Court of the county in which its Articles of Incorporation were originally filed, or in which its property is situated. A copy of the petition must be published for four weeks. The Court will then hear the petition, and any objections which any person may have

to make against the change of name; and if satisfied that the application is made for a good reason, the court may make an order changing the name of the corporation, A certified copy of the decree of the court must be filed in the office of the Secretary of State and in the office of the County Clerk.

Civil Code, Sections 1276, 1277, 1278; Act of the Legislature, in effect May 19, 1907.
Act of the Legislature, approved April 16, 1909.

Section 886.—CHANGE OF PLACE OF BUSINESS.—A corporation may change its place of business from one place to another in the same county, or from one city or county to another city or county in the State. Before such change can be made, the consent, in writing, of the holders of two-thirds of the capital stock must be obtained and filed in the office of the corporation; then notice of the intended removal must be published, for three weeks, in a newspaper in the county; the Board of Directors must then meet and authorize the change; and a copy of the resolution adopted by the Board, together with an affidavit of the publication of the notice (certified by the President and Secretary, with the corporate seal affixed), must be filed in each office where the original Articles of Incorporation were filed. After these requirements are complied with, a corporation may lawfully change its place of business.

Statutes of 1903, page 254.

Section 887.—REMOVAL FROM ONE LOCATION TO ANOTHER IN SAME CITY.—The law does not require any consent of stockholders, or notice, or publication, where a corporation desires to remove its place of business from one location to another in the same city, town, or village. Such removal may be made by authority alone of a resolution of the Board of Directors.

Section 887a.—USE OF WORD "TRUST."—No corporation is allowed to use the word "trust," or "trustee," as a part of its corporate name, unless its Articles of Incorporation authorize it to act as executor, administrator, guardian, assignee, receiver, depositary, or trustee. Before the Secretary of State issues to any corporation, authorized in its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depositary or trustee, there must be filed in his office the affidavit of the persons named in said articles as the first directors of the corporation, that at least one hundred thousand dollars of the capital stock, has actually been subscribed, and paid in to a person named in such affidavit, for the benefit of the corporation.

Act of the Legislature, in effect March 21, 1907.

Section 887b.—ANNUAL LICENSE TAX.—A new law was passed by the Legislature of 1907, and amended in 1909, about the annual license tax of corporations, which takes the place of previous legislation.

The law imposes an annual license tax, to be paid to the secretary of state, between the first day of July and the first day of September. If not paid on or before the hour of four o'clock, P. M., of the first day of September, the tax becomes delinquent, and ten dollars is added thereto, as a penalty for such delinquency. The license tax authorizes the corporation to transact its business during the year, or for any fractional part of the year, in which the license is paid. The year meant by the law is from the first day of July to and including the thirtieth day of June next thereafter. This license tax is imposed upon all corporations, whether foreign or domestic. For the failure to pay the tax, the charter of a domestic corporation may be forfeited, and also the right to do business in California of any foreign corporation.

At the time of filing a certified copy of articles of incorporation of any corporation when filed on or between the first day of July and the thirtieth day of September, in any

year, there shall be paid, in addition to all other fees required by law to be paid to the Secretary of State, the full amount of the license tax provided to be paid in section two of this act; when filed on or between the first day of October and the thirty-first day of December, in any year, a sum equal to three-fourths of the license tax provided for in section two of this act shall be paid; when filed on or between the first day of January and the thirty-first day of March, in any year, a sum equal to one-half of such license tax provided for in section two of this act shall be paid, and when filed on or between the first day of April and the thirtieth day of June, in any year, a sum equal to one-fourth of such license tax provided for in section two of this act shall be paid. Upon receipt of such full or fractional license tax the Secretary of State shall issue a license receipt for the full or for the fractional part of the then current fiscal year.

The amount of the license tax imposed is as follows: When the authorized capital stock of the corporation does not exceed ten thousand dollars the tax shall be ten dollars; when the authorized capital stock exceeds ten thousand dollars but does not exceed twenty thousand dollars the tax shall be fifteen dollars; when the authorized capital stock exceeds twenty thousand dollars but does not exceed fifty thousand dollars the tax shall be twenty dollars; when the authorized capital stock exceeds fifty thousand dollars but does not exceed one hundred thousand dollars the tax shall be twenty-five dollars; when the authorized capital stock exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars the tax shall be fifty dollars; when the authorized capital stock exceeds two hundred and fifty thousand dollars but does not exceed five hundred thousand dollars the tax shall be seventy-five dollars; when the authorized capital stock exceeds five hundred thousand dollars but does not exceed two million dollars the tax shall be one hundred dollars; when the authorized capital stock exceeds two million dollars but does not exceed five million dollars the

tax shall be two hundred dollars; when the authorized capital stock exceeds five million dollars the tax shall be two hundred and fifty dollars.

Act of the Legislature, approved March 20, 1907.

A corporation which has failed to pay the license tax may be reinstated, and relieved from forfeiture, by paying all delinquent license taxes and penalties incurred.

Act of the Legislature, approved March 19, 1909.

Section 887c.—DUPLICATE OF LOST CERTIFICATE.—Whenever a certificate of stock in a California corporation is lost or destroyed, the owner may bring an action against the corporation, in the Superior Court of the county in which its principal place of business is located, for the purpose of obtaining a new or duplicate certificate.

Statutes of 1905, page 500.

Section 887d.—CORPORATIONS TO LOAN MONEY ON CHATTEL MORTGAGES.—A corporation may be organized for the sole purpose of loaning money upon the pledge of goods and chattels. Such corporation must have a capital stock of $50,000, or over, and all the capital stock must be actually subscribed, and at least 50 per cent actually paid in, before any business is transacted.

Statutes of 1905, page 711.

Section 888.—CAPITAL STOCK.—The law provides that all corporations for profit in California must issue certificates for stock when fully paid up, signed by the President and Secretary, and may provide, in their By-Laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their By-Laws may provide. The corporation must keep an account of its stock, by whom owned, and the amount of subscriptions unpaid. It may issue its stock and commence business before subscriptions are all paid up, and even before the stock is all

subscribed for. The capital stock is the fund upon which the corporation does business, and is the sole basis of its credit. Therefore, no corporation can issue stock, except for money paid, labor done, or property actually received, and all fictitious increase of stock is declared by the law to be void.

Constitution of California, Article 12, Section 11;
Civil Code, Section 323.

Section 889.—AMOUNT OF SUBSCRIBED CAPITAL TO BE PAID IN.—It is only in the case of particular corporations that the law requires a certain amount of the subscribed capital stock to be paid in when the corporation is formed. As a general rule there is no requirement on the subject. The instances in which a certain per cent of the capital stock is required to be paid in will be stated in relation to particular corporations. Any certificate issued prior to full payment must show on its face what amount has been paid thereon.

Section 890.—STOCKHOLDERS AND MEMBERS.—Certain corporations are not required to have any capital stock, and a person associated with others in such a corporation is called a member. The holder of shares in a corporation having a capital stock is called a stockholder.

Section 891.—SHARES OF STOCK.—Whenever the capital stock of a corporation is divided into shares, and certificates have been issued, such shares of stock are personal property.

(a) **Preferred and Common Stock.**—A corporation may issue two classes of stock—preferred stock and common stock. If the two kinds are to be issued, the Articles of Incorporation must provide for the classification, and must contain a statement of the number of shares of preferred stock, and the number of shares to which no preference is given. The Articles of Incorporation must also state,

clearly and without evasion, the nature and extent of the preference granted to one class of the stock, and except as so declared there shall be no preference; and there can be no distinction between owners of the two classes of stock as to voting power and liability of stockholders.

(b) **Bonded Indebtedness.**—A corporation may create a bonded indebtedness by a vote of the stockholders representing at least two-thirds of the subscribed or issued capital stock, at a meeting called by the board of directors, and after giving the same notice required for increase of capital stock; or, a bonded indebtedness may be created by the unanimous vote of the board of directors, approved by the written assent of the stockholders holding two-thirds of the subscribed or issued capital stock, in the same manner as is provided for decreasing capital stock. The law does not limit the amount to which a bonded indebtedness may go, but merely provides that a corporation may create or increase its bonded indebtedness in the manner stated.

Act of the Legislature, in effect May 18, 1907.

Section 892.—SUBSCRIPTION FOR STOCK.—When a corporation is formed, and a person subscribes for a certain number of shares, by such subscription he becomes the owner of the stock; and it is not essential to create his rights as owner that the certificate should actually be issued to him. The other incorporators or promoters cannot, after a person has become a subscriber for stock, arbitrarily say, "We will not issue the stock to him," and thus avoid the binding force of the subscription; nor can the subscriber himself say, where the parties have acted in good faith, "I have changed my mind; I will not take the stock." By the subscription merely, the subscriber becomes bound to accept and pay for the shares he has subscribed for. And to guard against any imposition upon those who have subscribed for stock, the law provides that a subscription for capital stock cannot be rescinded or canceled, except for fraud or mistake, without the unanimous consent of all the

stockholders. What mistakes, or what acts of fraud in the organization of a corporation, would entitle any party to demand that a subscription for stock be canceled, must depend upon the peculiar facts of each case. If a party were induced by false statements or intentional misrepresentations, concerning material matters connected with the proposed corporation, to subscribe for its stock, this would be a fraud upon him for which he could demand that his subscription be canceled. But, whatever the rights of the subscriber might be in the courts, the corporation itself can never cancel a subscription for stock without first having the unanimous consent of all the stockholders. (Decided by the Supreme Court in the case of Pacific Fruit Company vs. Coon, which decision is printed in Volume 107 of the California Reports, page 447.)

Section 893.—TRANSFER OF SHARES OF STOCK.—Shares of stock in a corporation are transferred by indorsement and the delivery of the certificate. The indorsement is made by the signature of the owner, his agent, attorney, administrator, or executor. The transfer thus made, by indorsement and delivery, and nothing more, is valid between the parties to it. But to make such a transfer good as to third parties, something more is required; the transfer must be entered upon the books of the corporation, so as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number of shares, and the date of the transfer.

Civil Code, Section 324.

Section 894.—TRANSFER OF STOCK HELD BY NON-RESIDENT.—The officers of a corporation are not bound to enter on its books any transfer of its shares owned by parties residing out of the State, and are not bound to issue a certificate to the transferee, unless the person claiming under the transfer, or the attorney or agent of the non-resident owner, makes an affidavit or

produces other satisfactory evidence that the non-resident owner was alive at the date of the transfer; and if this affidavit is not made or evidence of such fact produced, the corporation may require an indemnity bond, with two sureties, conditioned to protect the corporation against any liability to the estate of the owner of the shares, in case of his being in fact dead before the transfer; and if neither the affidavit nor other evidence, nor the indemnity bond, is furnished when required, the corporation and its officers will not be liable for refusing to enter the transfer on the books.

Civil Code, Section 326.

Section 895.—TRANSFER OF STOCK HELD BY MARRIED WOMAN.—Shares of stock in corporations held by or owned by a married woman may be transferred by her, or her agent or attorney, without the signature of her husband, by indorsement and delivery of the stock.

Civil Code, Section 325.

Section 896.—VOID CERTIFICATES.—It is unlawful for any corporation in California to issue stock except for money paid, labor done, or property actually received. Stock cannot be lawfully issued without such consideration, and all certificates issued by any corporation in violation of this provision of the law are void.

Civil Code, Section 359.

Section 897.—REMEDY AGAINST CORPORATION REFUSING TO REGISTER TRANSFER OF STOCK.—If the officers of a corporation refuse to register a transfer of stock on its books, the person to whom the stock has been transferred may lawfully treat such refusal as a conversion of the shares by the corporation. He may then sue the corporation and obtain a judgment for the value of the stock at the time of the refusal to register the transfer, with interest at seven per cent per annum from that time.

Civil Code, Section 3336.

Section 898.—CERTIFICATES OF STOCK ARE NOT NEGOTIABLE.—Certificates of stock in a corporation are not negotiable, in a commercial sense. They are mere evidences of the holder's title to a given share in the property and franchises of the corporation of which he is a member. Consequently, if a corporation issues to an owner of shares of stock a certificate transferable on the books of the company by indorsement and surrender of the certificate, and he indorses the same and then loses it, and it comes into the hands of a bona fide purchaser for value, such purchaser acquires no right to the stock. (Decided by the Supreme Court in the case of Sherwood vs. Meadow Valley Mining Company, which decision is printed in Volume 50 of the California Reports, page 412.) In the case cited, the language of Parsons on Contracts is referred to, where he says: "The result would seem to be that all corporation bonds and government stocks, which pass by delivery, or indorsement with delivery, are negotiable; but that certificates of stock in a corporation are not."

Section 899.—WHEN CORPORATION CANNOT CLAIM ITS OWN STOCK INVALID.—A corporation is precluded from setting up the claim that its own stock is invalid, or not issued according to law, where the rights of a bona fide purchaser are involved. So it has been held that, where a corporation issues capital stock, and represents it as fully paid and causes it to be so listed on the stock and bond exchange, the law will deny it the right to claim that the stock is invalid, as against a bona fide purchaser, even if the stock was in fact issued without consideration. (Decided by the Supreme Court in the case of Smith vs. Martin, which decision is printed in Volume 135 of the California Reports, page 247.)

Section 900.—REMEDY AGAINST CORPORATION FOR REFUSING TO RECOGNIZE STOCKHOLDER.—If the corporation refuses to recognize the lawful holder

of stock as a stockholder, or refuses to deliver to him a new certificate, or to register him on its books, he has two remedies. He may sue in the Superior Court and compel the corporation to recognize him as a stockholder, by registering him upon its books and delivering to him a new certificate; or, he may sue the corporation for damages, on the ground that by its refusal it has been guilty of a conversion of his stock. These remedies are given not only to the real owner of the stock, but also to others, as the pledgee, the guardian, or the administrator. (Decided by the Supreme Court in the case of Herbert Kraft Company Bank vs. Bank of Orland, which decision is printed in Volume 133 of the California Reports, page 64.)

Section 901.—MORTGAGE OF SHARES OF STOCK.—The statute law declares what personal property may be mortgaged in California. Other personal property, however, may be mortgaged, and the mortgage will be good as between the parties to it. Shares of stock in a corporation are personal property. A mortgage of shares of stock may be made, which is valid and binding between the parties, and without delivery of possession of the certificate of stock. Such a mortgage is void as to creditors and subsequent purchasers in good faith for a valuable consideration; but where no such persons are complaining, the mortgage is good between the parties to it.

Section 902.—SEAL OF CORPORATION.—Every corporation must have a seal, but it need not be used upon every occasion. Corporations, like individuals, may appoint agents, and make most of the contracts which fall within their general powers, without the use of a seal.

Section 903.—DEED WITHOUT CORPORATE SEAL.—In a suit involving the validity of the deed of a corporation, executed without the corporate seal by

persons signing as Directors, one who claims under such deed must show affirmatively that the deed was authorized by a resolution of the Directors entered on the records of the corporation, or that it was ratified by such resolution. (Decided by the Supreme Court in the case of Barney vs. Pforr, which decision is printed in Volume 117 of the California Reports, page 56.)

Section 904.—WHAT REAL ESTATE MAY BE HELD BY CORPORATION.—A corporation may hold indefinitely any real estate necessary to be used by it in the conduct of its legitimate business; but the Constitution of California provides that no corporation shall hold for a longer period than five years any real estate, except such as may be necessary for carrying on its business. Therefore, if a corporation acquires any real estate, in any manner, which is not necessary in carrying on its business, it must sell such real estate within five years after the title is vested in it; and if it does not do so, the Attorney-General may bring a suit against the corporation, in the name of the people of the State, to compel it to sell the land.

Constitution of California, Article 12, Section 9.

Section 905.—CORPORATION MUST KEEP WITHIN OBJECT OF ITS CREATION.—It is one of the cardinal principles governing the conduct of a corporation that it must keep within the purposes and objects for which it was organized. If organized to carry on a particular business, it cannot engage in another. So, if a corporation formed to do a banking business should engage in insurance, the latter business would be outside of its legitimate object, and its acts in that business would have no validity. So far has this principle been carried in California, our Supreme Court has said that a contract of a corporation, outside of the object of its creation as defined by the law of its organization, and therefore beyond the

powers conferred upon it by the Legislature, is not voidable only, but wholly void and of no legal effect. The objection to such a contract is not merely that the corporation ought not to have made it, but that it could not make it.

Section 906.—VOID CONTRACT CANNOT BE RATIFIED.—A contract which is absolutely void, because outside of the objects of the corporation, cannot be ratified. The contract cannot be ratified by either party to it, because it could not have been authorized by either. No performance on either side can give a void contract any validity, or be the foundation of any right of action upon it. (Decided by the Supreme Court in the case of Chemical National Bank vs. Havermal, which decision is printed in Volume 120 of the California Reports, page 53.)

Section 907.—WHEN CORPORATION BOUND BY ITS OWN INVALID ACT.—While an absolutely void contract cannot be ratified, yet corporations are often bound by their own invalid act, as where the Directors have done an act without their lawful power, but the corporation has retained the benefits and still enjoys the fruits of the transaction. In such a case, the corporation is not permitted to deny the validity of its own act, although it was irregular or invalid. This rule is illustrated by a decision of the Supreme Court, where a promissory note was irregularly executed by the President and Secretary of a corporation, and upon being sued on the note, the corporation, without returning or offering to return the money received from the lender, denied the validity of the note and attempted to repudiate it. The Supreme Court said: "Assuming that the contract was outside its power, the law does not allow a corporation to retain the benefits which it has received from the contract and escape liability upon it. The invalidity of a contract is subject to the equitable exception that, although a corporation in making a contract acts in disagreement with its

charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains. The exception referred to is founded upon the fact that the contract, though invalid, has been executed in the interests of the corporation, and for its benefit and advantage. Where, therefore, it has received the fruits of such a contract, it cannot refuse payment on the ground that it had no power to contract. It would be otherwise if the contract had not been executed." (Decided by the Supreme Court in the case of Main vs. Casserly, which decision is printed in Volume 97 of the California Reports, page 127.)

Section 908.—NOTICE TO CORPORATION.—The President is the proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears, or understanding, save through its agents. The President is considered the head of the corporation, and it is his duty to report to the Directors information affecting the interests of the corporation. Therefore, notice of any matter, given to the President, is notice to the corporation.

Section 909.—LEASE OF FRANCHISE.—Where a corporation secures a franchise, by municipal grant, to operate gas and electric works, and to supply the inhabitants of the city with the product, it cannot lawfully lease its works and privileges to another, and such a lease, when made, is against public policy and void. The reason for this is, a franchise is a personal privilege, and can never be assigned without the consent of the grantor. (Decided by the Supreme Court in the case of Visalia Gas and Electric

Light Company vs. Sims, which decision is printed in Volume 104 of the California Reports, page 326.)

Section 910.—MORTGAGE OF CORPORATION PROPERTY.—The President has not the power by virtue of his office to mortgage the property of the corporation. Nor has the Secretary such power by virtue of his office. Nor have both together the power which neither has separately, nor have the stockholders such power. The powers of a corporation must be exercised, and its property controlled, by its Board of Directors, the decision of a majority of the Directors, when lawfully assembled, being valid as a corporate act. A mortgage of the corporation property can only be made by authority of a resolution of the Board of Directors, adopted by a majority vote, at a meeting lawfully held, and the transaction recorded in its minutes. If there is no resolution of the Board of Directors authorizing it, a mortgage of the corporation's property, though executed by the proper officers, is illegal and invalid.

Section 911.—ASSIGNMENT OF ACCOUNTS.—In the conveyance of real estate, and the encumbrance of corporation property by mortgage, corporations are held to much narrower rules than apply to the transaction of its ordinary business affairs. It is not contemplated that the Board of Directors shall meet upon every occasion when a contract is to be made, or other act done, in the ordinary conduct of the business of the company. Therefore, the President or General Manager of a corporation has power to assign its book accounts for collection, where the assignment is in the ordinary course of its business, and known to and acquiesced in by the Directors, and such a transaction as the officers have been in the habit of doing; and such assignment under such circumstances will be valid without previous authorization by resolution of the Board. The President or General Manager may also have like

authority to make assignments of notes held by the corporation, to its creditors, either in payment of or as security for the payment of a debt of the corporation, without express authority of the Board of Directors. (Decided by the Supreme Court in the case of Greig vs. Riordan, which decision is printed in Volume 99 of the California Reports, page 316.)

Section 912.—LIABILITY OF PROMOTERS.—A promoter is one who brings about the incorporation and organization of a corporation; who brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which results in the formation of the corporation. A promoter occupies a position of confidence towards those whom he induces to enter into the interprise. And if a promoter obtains property for the corporation, and transfers the property to the corporation for a sum which he falsely represents to be the cost price, but which is really much more, he will he liable to the stockholders for the profit made by him through his deceit. And in all other matters a promoter must deal fairly and openly with his associates in the formation of a corporation.

Section 913.—WHAT IS A CORPORATION DE FACTO.—It sometimes happens that, in the formation of a corporation, many of the acts required to be performed in order to make a complete organization may have been irregularly performed, or some of them may have been entirely omitted; yet, if the company has proceeded, claiming in good faith to be a corporation under the laws of California, and is doing business as such corporation, a party with whom it transacts business, and who accepts the benefit of its acts, cannot deny the validity of its incorporation. For it is termed a corporation de facto, a company in fact doing the business in good faith for which it was designed, although not organized strictly in accordance with law.

Section 914.—WHO MAY QUESTION THE VALIDITY OF A CORPORATION.—The question of the due incorporation of any company claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, or of its right to exercise corporate powers, cannot be inquired into, collaterally, in any private suit to which such de facto corporation may be a party. The State alone, through its Attorney-General, has power to bring a suit to test the right of such a corporation to exercise corporate powers.

Section 915.—DENIAL THAT A CORPORATION EXISTS.—It does not follow, because the State alone can question the validity of a corporation or its right to exercise corporate powers, when the company claims in good faith to be a corporation and is doing business as such, that an individual is never permitted to deny the corporate existence. For it is true that, whenever a corporation brings a suit in the courts of this State, it must allege that it is a corporation, and the defendant may deny the fact, and then the corporation must prove it. And if it should appear that a body of men had met and declared that they constituted themselves a corporation, but neither subscribed to the capital stock, nor adopted Articles of Incorporation, nor appointed the officers, nor performed any act in the organization of the corporation required by law, nor transacted any business as a corporation—in such a case the court would declare, even in a suit between private parties, that there was no incorporation and no right to exercise corporate powers.

Section 916.—STOCKHOLDER'S RIGHT TO INSPECT BOOKS AND RECORDS.—The stockholder is interested in all the affairs and the management of the corporation. He is, in one sense, a part owner of the assets, his part being represented by the number of shares owned by him. The law of California, recognizing the necessity

for an inspection by the stockholder of the books and records, whenever he desires to do so, has provided that all corporations for profit must keep a record, among other things, of all their business transactions; and that such records shall always be open to the inspection of any Director, member, or stockholder. It is the legal right of the stockholder to inspect, and the duty of the officers to allow him to inspect, at all times, the books and records of the corporation.

Constitution of California, Article 12, Section 14; Civil Code, Section 377.

Section 917.—MOTIVES OF STOCKHOLDERS IN MAKING EXAMINATION OF BOOKS.—The motives of the stockholder in demanding the right to make an examination of the books of the corporation will make no difference. He may not really have any specific interest at stake, rendering his inspection necessary; there may be no beneficial purpose on his part for which the examination is desired; he may wish to enforce a mere naked right, or to gratify mere idle curiosity; his motives may in fact be improper, and he may be seeking to gain information of a secret nature with the object of furnishing it to a rival company or corporation, to the injury and damage of the corporation whose books he examines; but none of these facts, if they exist, will be a legal excuse for refusing to allow a shareholder, however small his interest, to examine the books and records of the corporation. The shareholder is not required to show any reason or occasion for making the examination, nor can he be met with the defense that his motives are improper. (Decided by the Supreme Court in the case of Johnson vs. Langdon, which decision is printed in Volume 135 of the California Reports, page 624.)

Section 918.—LIABILITY OF STOCKHOLDERS FOR FURNISHING INFORMATION TO RIVAL CORPORATION.—When it becomes known to the officers of

a corporation that a stockholder has made an examination of the books with an improper motive, and that he has furnished information thus obtained to a rival corporation or company, the corporation he has so injured and damaged is not left by the law without a remedy. The guilty stockholder cannot be enjoined from inspecting the books, nor can the books be lawfully closed to him. But, by thus obtaining and disclosing information, he becomes liable in damages to the corporation, and the corporation can recover a judgment against him for all the damages which are occasioned to it by his conduct. True, he may not be financially able to pay the amount recovered, and the judgment, when obtained, may be worthless; but the law does not take these matters into account; and a suit for damages is the only remedy a corporation has against its own stockholder who examines its books with an improper motive and for the purpose of injuring it.

Section 919.—**REMEDY OF STOCKHOLDER WHEN INSPECTION OF BOOKS IS REFUSED.**—If a stockholder applies to the proper officer, generally the secretary, in charge of the books, and demands the right to make an examination, his remedy upon refusal is to apply to the Superior Court of the county for a writ of mandate. The shareholder has a right to be fully informed as to the conditions of the corporation, the manner in which its affairs are conducted, and how the capital to which he has contributed is employed and managed. And if an examination of the books is refused him, upon showing this fact in a petition to the Superior Court, together with the fact that he is a stockholder, the law requires the Court to issue a writ commanding the officers of the corporation to open its books, records, and journals to his examination and inspection.

Section 920.—**LIABILITY OF STOCKHOLDER FOR CORPORATION DEBTS.**—The law of California imposes upon each stockholder the burden of paying the

debts of the corporation. Each stockholder is individually and personally liable for such proportion of the debts of the corporation as the amount of stock owned by him bears to the whole of the subscribed capital stock. That is, if a person owns shares of stock to the amount of $10,000, and the subscribed capital stock is $100,000, he will be individually and personally liable for the one-tenth part of the debts of the corporation. It will make no difference in his liability whether the subscriptions have been paid in or not; for his proportion is measured, not by the capital actually paid in, but by the capital stock subscribed. If debts or claims are owing by or presented to a corporation, the stockholder is liable only for his proportion of such debts or claims. It will make no difference, either, whether the corporation is a domestic or foreign corporation; the liability of their stockholders in California is the same. The liability of a stockholder is not released by any subsequent transfer of stock, and such transfer will not free him from responsibility on account of a debt incurred by the corporation while he was a stockholder.

Civil Code, Section 322; Statutes of 1905, page 396.

Section 921.—LIABILITY OF MEMBER WHERE THERE IS NO CAPITAL STOCK.—In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities. His liability is to be measured by a comparison of the amount of the debt with the number of members; and, therefore, if the corporation owes $10,000, and there are ten members, each will be liable for the one-tenth part of the debt, or $1,000.

Civil Code, Section 322.

Section 922.—PLEDGEE OR TRUSTEE NOT LIABLE FOR DEBTS.—A person who holds stock as collateral security does not become, by reason of the pledge, liable for the debts of the corporation; but the pledgor

remains liable, as before the pledge. A person holding stock merely as a trustee does not become, in such representative capacity, liable for the debts of the corporation; but the person he represents as trustee is deemed the stockholder, as respects such liability.

Civil Code, Section 322.

Section 923.—WHEN LIABILITY OF STOCKHOLDER BEGINS.—The liability of a stockholder for the debts of the corporation begins when he acquires his stock. He is not liable for the debts of the corporation incurred before he acquired his stock. For instance, to make a stockholder liable to pay his proportion of the amount due on a note made by the corporation, it must appear that the debt for which the note was given was incurred since he became a stockholder. For if a corporation buys goods, before the stockholder acquires his stock, and afterwards makes its note for the amount, that stockholder is not liable on the note, because it was made for a debt incurred prior to the time when he became a stockholder. The stockholder's liability begins with the creation of the original debt, and the debt must be incurred while he is a stockholder, and not before; for otherwise, he is not liable at all. (Decided by the Supreme Court in the case of Winona Wagon Company vs. Bull, which decision is printed in Volume 108 of the California Reports, page 1.)

Section 924.—FRAUDULENT TRANSFER.—The question sometimes arises whether, when a corporation becomes insolvent, and unable to pay its debts as they become due in the ordinary course of business, a stockholder can transfer his shares to another and thus be rid of liability for the debts of the concern. The Supreme Court, in the case of Welch vs. Sargent, said on this point: "Generally speaking, the law places no restriction upon the right of a stockholder of a corporation to transfer his stock, so long as the

corporation is solvent. But after the corporation has become insolvent, and the stockholder knows this, a shareholder cannot transfer his stock to irresponsible parties so as to relieve himself from liability to the creditors." It matters not what his intention was, for he may have transferred the stock in good faith, yet the law will still protect the creditors of an insolvent corporation by holding such a transfer void as to them. (Decided by the Supreme Court in the case of Welch vs. Sargent, which decision is printed in Volume 127 of the California Reports, page 72.)

Section 925.—STOCKHOLDER MAY SUE OTHER STOCKHOLDERS.—A stockholder may sue other stockholders in the same corporation for their pro rata of a debt due him by the corporation. (Decided by the Supreme Court in the case of Brown vs. Merrill, which decision is printed in Volume 107 of the California Reports, page 446.)

Section 926.—ASSIGNEE OF CREDITOR MAY SUE STOCKHOLDERS.—The creditor of a corporation may assign his account for collection, and the assignee will have the right to sue the stockholders in his own name. It is no defense, in a suit against stockholders, that the assignee, instead of the original creditor, brings the suit to collect the amount of the debt.

Section 927.—CREDITOR'S RIGHT TO UNPAID SUBSCRIPTIONS.—Debts due to a corporation constitute a portion of its assets, and may be reached by creditors. Among these are unpaid subscriptions to stock. As to creditors, the corporation is presumed to have sought credit based on its supposed capital, actually paid in or due from its stockholders. As the supposed capital is the sole basis of credit, the stockholders, who are the real parties carrying on the business, must make the representation as to its

capital good; and a corporation cannot release the obligations of stockholders to pay up its unpaid subscriptions, and thus evade the payment of creditors. And the creditors may bring a suit to collect the unpaid balance due on stock of a corporation which has become insolvent.

Section 928.—WITHIN WHAT TIME SUIT AGAINST STOCKHOLDER MAY BE COMMENCED.—A suit against a stockholder by a creditor of a corporation must be commenced within three years after the cause of action accrues. If a corporation owes a debt, and the creditor wishes to sue a stockholder for his proportion of the amount due, he must sue within three years after the debt was created, or the liability of the stockholder will be barred. And in this connection it has been decided that the liability of the stockholder cannot be renewed or extended by any renewal or extension of the indebtedness which the creditor may make with the corporation. (Decided by the Supreme Court in the case of Hyman vs. Coleman, which decision is printed in Volume 82 of the California Reports, page 650.) The liability of the stockholder is created and exists by statute. The liability arises when a debt is contracted by the corporation. The liability is limited to three years from the time it arises, and the corporation has no power to extend that limitation without direct authority from the stockholders. Therefore, if a debt is owing to a corporation, and the corporation afterwards takes a note from the debtor, the liability of the stockholder does not begin when the note is given, but dates back to the time when the debt was created. (Decided by the Supreme Court in the case of Hunt vs. Ward, which decision is printed in Volume 99 of the California Reports, page 612.)

Code of Civil Procedure, Section 359.

Section 929.—WHEN LIABILITY OF STOCKHOLDER IS SATISFIED.—Each stockholder has a

several liability, and that liability is proportionate to the amount of his stock; and when he has paid his portion of any debt, or of all the debts of the corporation, he is freed from all liability on that account.

Section 930.—LIABILITY OF STOCKHOLDERS IN DISTILLERY FOR FEDERAL TAXES.—Every stockholder in a corporation possessing a still, distillery, or distilling apparatus, is individually and personally liable to the United States for the taxes imposed on the liquors distilled. His individual property, although in no way connected with the business of such corporation, may be seized and distrained for Federal taxes due on spirits produced by it. (Decided by the Supreme Court in the case of Richter vs. Blasingame, which decision is printed in Volume 110 of the California Reports, page 530.)

Section 931.—HOLDING PROPERTY IN OTHER COUNTIES.—A corporation acquiring or holding property in a county other than its principal place of business must file in the office of the County Clerk of such county a certified copy of its Articles of Incorporation. The copy must be certified by the Secretary of State.

Civil Code, Section 299.

Section 932.—WITHIN WHAT TIME CORPORATION MUST COMMENCE BUSINESS.—A corporation must organize, by the election of a Board of Directors, and must commence business, within one year from the date of its certificate of incorporation. If it does not do so, or, if organized for the construction of any particular works, it fails to commence the construction of its works within one year, any creditor may complain to the Attorney-General, who will begin a suit in the name of the State and have the Court declare the corporate existence forfeited and at an end.

Statutes of 1901, page 632.

Section 933.—FAILURE TO ELECT OFFICERS.—If a corporation does organize within one year, but neglects and fails, for two years thereafter, to elect a President, Secretary, Cashier, or any necessary officers, and to transact in regular order the business for which it was incorporated, its corporate powers cease and it will be dissolved.

Statutes of 1901, page 632.

Section 934.—INCREASE OF CAPITAL STOCK.—A corporation may increase its capital stock, at any time, and the law provides what must be done when an increase of stock is desired. To increase the capital stock, a meeting of the stockholders must be called for that purpose by a resolution of the Directors. A notice must be published in a newspaper, once a week, for at least sixty days, stating that the object of the meeting is to vote on the question of increasing the capital stock; the amount to which it is proposed to increase the capital; and the time and place of holding the meeting. The meeting must be held at the principal place of business of the corporation and in the building where the Directors usually meet. In addition to the notice by publication, the Secretary must also address a copy of the notice to each of the stockholders whose names appear on the company's books, at his place of residence, if known; and if the residence of the stockholder is not known, the notice must be addressed to him at the place where the company has its principal place of business; and the notice must be mailed to each stockholder at least thirty days before the day appointed for the meeting. When the meeting takes place, two-thirds of the subscribed or issued stock must be voted in favor of the proposition to increase the capital stock, in order to carry it.

Statutes of 1903, page 347.

Section 935.—DECREASE OF CAPITAL STOCK.—The capital stock of a corporation may be decreased in either one of two ways. It may be decreased by a vote of

the stockholders, at a meeting for the purpose, held in the same manner and after similar notice as a meeting for increase of stock. The notice must state the amount of the decrease proposed, and the proposed decrease must be carried by a vote representing at least two-thirds of the subscribed or issued capital stock. The law provides a second mode of decreasing the capital stock. A corporation may diminish its capital stock by the unanimous vote of its Board of Directors, at a regular meeting, or at a special meeting called for that purpose, and approved by the written assent of stockholders holding two-thirds of the subscribed or issued capital stock. The written assent of the stockholders must be filed with the Secretary. The Secretary, as soon as the resolution of the Directors is passed providing for the decrease, must send a copy of the resolution to each stockholder whose name appears on the company's books; he must send by mail, postage prepaid, addressed to the known place of residence of the stockholder, or to the principal place of business of the corporation, if the residence of the stockholder is not known; and the copy of the resolution must be mailed to each stockholder at least thirty days before the certificate mentioned in the following section is made and filed. Within the thirty days any stockholder may file with the Secretary his dissent in writing. The capital stock cannot be decreased to an amount less than the indebtedness of the corporation.

Statutes of 1903, page 348.

Section 936.—CERTIFICATE OF INCREASE OR DECREASE OF CAPITAL STOCK.—If capital stock is increased or decreased by a vote of the stockholders, a certificate, signed and verified by the President and Secretary and a majority of the Directors, and with the corporate seal attached, must be filed in the office of the County Clerk, and a certified copy must be filed in the office of the Secretary of State. The certificate must show

that all the requirements of the law have been complied with; also, the amount to which the capital stock has been increased or diminished; the amount of stock represented at the meeting, and the total vote in the affirmative, and the total vote in the negative; and the total number of subscribed or issued shares of capital stock of the corporation. If the stock is decreased by a vote of the Directors, a similar certificate must be filed, which must show, also, the total amount of stock represented by the written assents and the written dissents filed with the Secretary.

Statutes of 1903, page 349.

Section 937.—PAPER IN WHICH NOTICES MUST BE PUBLISHED.—When the By-Laws of a corporation prescribe the paper in which notices of meetings of Directors or stockholders are to be published, such notices must be published in that paper. If the By-Laws do not prescribe any particular paper, the Directors may select the paper in which notices may be published.

Section 938.—ASSESSMENT OF STOCK.—The Directors of any corporation in California, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock.

Civil Code, Section 331.

Section 939.—AMOUNT OF ASSESSMENT.—The law provides generally that no one assessment must exceed ten per cent of the capital stock named in the Articles of Incorporation. To this general provision there are three exceptions, viz.: (1) If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may

be for such a percentage as will raise that amount; (2) The Directors of railroad corporations may assess the capital stock in installments of not more than ten per cent per month, unless their Articles of Incorporation provide otherwise; and (3) the Directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper.

Civil Code, Section 332.

Section 940.—ORDER LEVYING ASSESSMENT.—The assessment must be levied by an order of the Board of Directors. Every order levying an assessment must specify the amount thereof, to whom, and where payable; fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

Civil Code, Section 334.

Section 940a.—LEVY OF ASSESSMENT.—The right to levy an assessment upon the capital stock of a corporation can only be legally exercised in the manner provided by law or by the charter of the corporation.

Levy Must be Made at Regular or Specially Called Meeting.—An assessment upon the capital stock of a corporation can be levied only at a regular meeting or at a special meeting regularly called.

Adjournment of Time of Holding Regular Meeting by Minority of Directors to Future Day Not a Regular Meeting—Assessment Levied at Such Meeting Void.—An assessment levied by a majority of a board of directors of a corporation in the absence and without the knowledge of the minority of the board, at a time to which the regular monthly meeting of the board had been adjourned by a

minority of the board present on the day of the regular meeting, on account of the absence of a quorum, is void, as such meeting is neither a regular meeting nor a specially called meeting.

Directors' Meetings—Adjournment by Minority Unauthorized.—There is no provision of the code authorizing a meeting of the directors of a corporation to be adjourned by a minority, and such act is invalid under the express provision of Section 305 of the Civil Code.

(Decided by the California District Court of Appeals, in the case of Raisch vs. M. K. & T. Oil Co., which decision is printed in California Appellate Decisions, Volume 6, No. 284, page 403.)

Section 941.—NOTICE OF ASSESSMENT.—A notice of the assessment must be published by the Secretary, once a week for four successive weeks, in a newspaper published at the principal place of business, if there be one, or, if there is none, then the notice must be published in some other newspaper in the county. If the principal place of business is in one county, and the works of the company in another, the notice must be published in both counties for the same length of time. Also, the notice must either be personally served upon each stockholder, or sent through the mail addressed to him. If the stockholder's address is known, the notice must be mailed there; but if the address is not known, it is sufficient to mail the notice to him at the principal place of business of the corporation.

Civil Code, Section 336.

Section 942.—FORM OF NOTICE OF ASSESSMENT.—The notice of assessment, mentioned in the preceding section, must be substantially in the following form:—

NOTICE OF ASSESSMENT.

WILLITS STATE BANK.—Location of principal place of business, Willits, Mendocino County, State of California. Notice is hereby given, that at a meeting of the

Directors, held on the ..... day of ....., 190.., an assessment of ..... per share was levied upon the capital stock of the corporation, payable on the ..... day of ....., 190.., to the Secretary of said Willits State Bank, at his office in said bank in Willits, Mendocino County, State of California. Any stock upon which this assessment shall remain unpaid on the ..... day of ....., 190.., will be delinquent and advertised for sale at public auction, and, unless payment is made before, will be sold on the ..... day of ....., 190.., to pay the delinquent assessment, together with costs of advertising and expenses of sale.

....,
Secretary.

Office at Willits State Bank, Main Street,
Willits, California.

Section 943.—HOW ASSESSMENT MAY BE ENFORCED.—The law provides two methods for the enforcement of the liabilities of stockholders to the corporation, by reason of assessments levied upon the capital stock—one by a sale of the stock, for the delinquent assessment; the other by a suit against the stockholder to recover from him the amount of the assessment. The Board of Directors has the option to adopt one or the other method of enforcing the payment of an assessment on stock lawfully levied.

Civil Code, Section 349.

Section 944.—NOTICE OF SALE.—If any portion of the assessment remains unpaid, on the day named in the notice for declaring the stock delinquent, the Secretary must, if the Directors elect to have the stock sold, publish a notice of sale in the same paper in which the delinquent notice was published. The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale. The notice must specify

every certificate of stock, the number of shares it represents, and the amount due thereon, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon, together with the fact that the certificates for such shares have not been issued, must be stated.

Civil Code, Sections 338, 339.

Section 945.—FORM OF NOTICE OF SALE.—The following is a form of the notice of sale mentioned in the preceding Section:—

NOTICE OF SALE OF STOCK FOR DELINQUENT ASSESSMENT.

WILLITS STATE BANK.—Location of principal place of business, Willits, Mendocino County, State of California. Notice is hereby given, that there is delinquent upon the following described stock of the corporation, on account of assessment levied on the ..... day of ....., 190.., the several amounts set opposite the names of the respective shareholders, as follows: (Here insert names, number of certificate, number of shares, and amount.) And in accordance with law, and an order of the Board of Directors made on the ..... day of ....., 190.., so many shares of each parcel of such stock as may be necessary will be sold, at public auction, at the office of the Secretary of said corporation, at the Willits State Bank, Main Street, Willits, Mendocino County, State of California, on the ..... day of....., 190.., at 10 o'clock A. M. of that day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

....., Secretary.

Office at Willits State Bank, Main Street, Willits, Mendocino County, State of California.

Section 946.—WHO ARE LIABLE ON ASSESSMENTS.—For the purpose of ascertaining those who are liable to it for the amount of an assessment, a corporation can look only to the list of stockholders as their names are registered upon its books. Where an assignment of stock is made after the levy of an assessment, but no formal

transfer is made on the books of the company, the assignor is still liable on the assessment. Where stock has been assigned, and a transfer of the stock has been duly made on the books of the company, the assignee becomes liable on assessments.

Section 947.—EXTENSION OF TIME FOR PAYMENT AND SALE.—The dates fixed in any notice of assessment or notice of delinquent sale may be extended from time to time for not more than thirty days, by order of the Directors, entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates.

Civil Code, Section 345.

Section 948.—SALE OF STOCK FOR ASSESSMENT.—By the publication of the notice, the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or cost of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale. On the day, at the place, and at the time appointed in the notice of sale, the Secretary must, unless otherwise ordered by the Directors, sell or cause to be sold at public auction, to the highest bidder for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessments and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising, in addition to the assessments. The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the

stock books of the corporation, on payment of the assessment and costs.

Civil Code, Sections 340, 341, 342.

Section 949.—PURCHASE OF DELINQUENT STOCK BY THE CORPORATION.—If, at the sale of stock, no bidder offers the amount of the assessments and charges due, the same may be bid in and purchased by the corporation, through the Secretary, President, or any Director, at the amount of the assessments, costs, and charges due; and the amount of the assessments, costs, and charges must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock of the corporation must be made on the books. While the stock remains the property of the corporation, it is not assessable, nor must any dividends be declared thereon; but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation. All purchases of its own stock made by any corporation vest the legal title to the stock in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the By-Laws of the corporation or the vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock, for all purposes of election, or voting on any question at a stockholders' meeting.

Civil Code, Sections 343, 344.

Section 950.—SUIT TO RECOVER AMOUNT OF ASSESSMENT.—On the day specified for declaring the stock delinquent, or at any subsequent time before the sale of the delinquent stock, the Board of Directors may order all such proceedings stopped, and may elect to sue the delinquent stockholders for their assessments. The

stockholder is liable in the suit for the amount of the assessment, and for the costs and expenses incurred by the corporation in trying to collect it.

Civil Code, Section 349.

Section 951.—LIEN FOR ASSESSMENT.—After an assessment has been made, a corporation has a lien for the payment of the assessment, which is not affected by the issuance of a new certificate and a transfer of the shares. The lien is upon the shares, and not upon the certificate. When an old certificate is surrendered, and a new certificate is issued, the new certificate represents the same shares; but the shares themselves remain subject to any lien the corporation may have upon them, and the new owner takes subject to such lien. The identity of the stock is not affected by the transfer. The keeping of a stock book, in which the original issue and all subsequent transfers must be entered, enables the holder or purchaser to trace his shares back to the original issue by the numbers of the different certificates, and thus identify the shares upon which any assessment has been made, and enables him to ascertain with certainty, in connection with the other records of the corporation relating to assessments and delinquent sales, whether his shares are free from liens or liability in favor of the corporation; and in the same manner enables the corporation to enforce its delinquent assessment upon the shares liable therefor, no matter how many transfers have been made subsequent to the assessment; each transferee taking the legal title, but subject to the assessment, just as the grantee of the legal title to land takes it subject to all valid recorded liens. (Decided by the Supreme Court in the case of Craig vs. Hesperia Land and Water Company, which decision is printed in Volume 113 of the California Reports, page 7.)

Section 952.—BY-LAWS OF CORPORATION.—Every corporation formed under the laws of California must, within one month after filing Articles of Incorporation,

adopt By-Laws for the government of the corporation. The By-Laws adopted must not be inconsistent with the Constitution and laws of the State.

Section 953.—HOW BY-LAWS ADOPTED.—The assent of stockholders, representing a majority of all the subscribed capital stock, or a majority of the members, if there be no capital stock, is necessary to adopt By-Laws, if they are adopted at a meeting called for that purpose. By-Laws may also be adopted, without a meeting for that purpose, by the written assent of the holders of two-thirds of the stock, or by the written assent of two-thirds of the members, if there is no capital stock. If a meeting of stockholders is called for the purpose of adopting By-Laws, notice must be given by publication in a newspaper for two weeks, by order of the acting President.

Civil Code, Section 301.

Section 954.—WHAT BY-LAWS MAY PROVIDE FOR.—A corporation may, by its By-Laws, provide for the following things. (1) The time, place, and manner of calling and conducting its meetings, and may dispense with notice of all regular meetings of the stockholders or Directors; (2) The number of stockholders or members constituting a quorum; (3) The mode of voting by proxy; (4) The qualifications and duties of Directors, the time of their annual election, and the mode and manner of giving notice of such election; (5) The compensation and duties of officers; (6) The manner of election and the term of office of all officers other than the Directors; (7) Suitable penalties may be provided for the violation of the By-Laws, not exceeding $100 for any one offense; (8) The amount of stock to be owned by a Director; (9) For the filling of vacancies on the Board of Directors; (10) For the issuing of certificates of stock before full payment therefor; (11) For the disposal of stock owned by the corporation; and, (12) The By-Laws may specify the newspaper in

which all notices of the meetings of stockholders or Directors, when notice is necessary, shall be published.

Civil Code, Sections 301, 305, 308, 323, 344.

Section 955.—BOOK OF BY-LAWS.—The law provides that all By-Laws adopted must be certified by a majority of the Directors and Secretary of the corporation, and copied in a legible hand, in a book kept in the office of the corporation, to be known as the "Book of By-Laws," and no By-Law shall take effect until so copied, and the book shall then be opened to the inspection of the public during office hours of each day except holidays.

Civil Code, Section 304.

Section 956.—AMENDMENT OF BY-LAWS.—The By-Laws can be amended by a vote of the stockholders at the annual meeting, or at a special meeting called for that purpose. There must be a vote representing two-thirds of the subscribed stock. The By-Laws may also be amended, without a meeting, by the written assent of the holders of two-thirds of the stock, or two-thirds of the members if there is no capital stock.

Civil Code, Section 304; Statutes of 1905, page 557.

Section 957.—REPEALING OLD AND ADOPTING NEW BY-LAWS.—Old By-Laws may be repealed absolutely, and new By-Laws adopted in their place, in the same manner as amendments are made, stated in Section 956.

Section 958.—RECORD OF AMENDMENTS.—The law provides that, "whenever any amendment or new By-Law is adopted, it shall be copied in the Book of By-Laws with the original By-Laws, and immediately after them, and shall not take effect until so copied. If any By-Law be repealed, the fact of repeal, with the date of the meeting

at which the repeal was enacted, or written assent was filed, shall be stated in said book, and until so stated the repeal shall not take effect."

Civil Code, Section 304.

Section 959.—THE BOARD OF DIRECTORS.—The corporate powers, business, and property of corporations must be exercised, conducted, and controlled by a Board of Directors.

Section 960.—NUMBER OF DIRECTORS.—The law is, that the number of Directors cannot be less than three, but may be any number more than three. The number of Directors may be increased to more than three without limit, to as many as may be desired at any time after articles of incorporation have been filed, by a vote of the majority of the stockholders of the corporation; and if the corporation has been formed with more than three Directors, a majority of the stockholders may vote to decrease the directors to any number not less than three. The increase or decrease of the number of Directors must be at a meeting of the stockholders called for that purpose. When the number of Directors has been increased or decreased, a certificate stating that fact must be filed in the same manner as articles of incorporation were filed.

Act of the Legislature, in effect May 18, 1907.

Section 961.—QUALIFICATION OF DIRECTORS.—A majority of the Directors must be citizens of California. Directors of corporations for profit must be holders of its stock to an amount fixed by the By-Laws of the corporation; Directors of all other corporations must be members thereof.

Statutes of 1901, page 308.

Section 962.—DIRECTORS FOR THE FIRST YEAR.—The Directors to serve for the first year, or until the time fixed for the election of Directors, are designated in

the Articles of Incorporation; and the persons named in the Articles of Incorporation, upon the organization of a corporation, will serve until their successors are regularly elected.

Section 963.—ELECTION OF DIRECTORS.—The Directors of a corporation must be elected annually by the stockholders or members, and if no provision is made in the By-Laws for the time of election, the election must be held on the first Tuesday in June. There must be a majority of the subscribed capital stock, or of the members where there is no capital stock represented at the meeting for the election of Directors, either in person or by proxy in writing. The election must be by ballot, and every stockholder has the right to vote in person or by proxy the number of shares standing in his name, for as many persons as there are Directors to be elected, or he may cumulate his shares and give one candidate as many votes as the number of Directors multiplied by the number of his shares of stock shall equal; or the stockholder may distribute his shares on the same principle among as many candidates as he shall think fit. These provisions of the law to apply to all corporations doing business in this State, domestic or foreign. The Director receiving the highest number of votes shall be declared elected. In corporations having no capital stock, each member of the corporation may cast as many votes for one Director as there are Directors to be elected, or he may distribute them among any or all the candidates.

Civil Code, Sections 302, 312; Statutes of 1903, page 253.

Section 963a.—NOTICE OF MEETINGS.—Notice of meetings of the stockholders to elect directors must be given, by the secretary, unless all of the stockholders waive such notice in writing. When all the stockholders or members of a corporation are present at any meeting, however called

or notified, and sign a written consent thereto on the records of such meetings, or if those not present sign in writing a waiver of notice of such meeting, which waiver is presented and made a part of the records of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed.

Act of the Legislature, approved February 22, 1909.

Section 964.—WHO MAY VOTE AT ELECTION OF DIRECTORS.—To entitle a person to vote at the election of Directors, he must be a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days before the election. It is made a requisite of the right to vote that the voter shall not only be registered as a stockholder, but that he shall have been so registered for at least ten days prior to the election, and that he shall also be a bona fide stockholder at the time of the election. The voter must be either the owner of the stock, or have some other interest in it, in order to be a bona fide stockholder. Therefore, one in whose name stock has been registered upon the books of the corporation, but who has never had any interest in the stock, and is only a dummy for the real owner, and when the change on the books was made for the purpose of enabling the real owner to avoid his liabilities, is not a bona fide stockholder, within the meaning of the law, and should not be allowed to vote at an election of Directors. (Decided by the Supreme Court in the case of Smith vs. S. F. and N. P. Railway Company, which decision is printed in Volume 115 of the California Reports, page 584.)

Civil Code, Sections 307, 312.

Section 965.—WHO MAY VOTE PLEDGED STOCK.—One may be, in several supposed cases, a bona fide stockholder without being the owner of the stock. When the owner of stock pledges it as security for a debt, the creditor in whose hands it is placed has the right to have the stock

transferred to his own name upon the books of the corporation, and if he does so ten days before the election, or other occasion when a vote is to be taken upon any question, he, and not the real owner, will have the right to vote the stock. True, he is not the owner, but by his pledge he has acquired such an interest in the stock and its proceeds as makes him a bona fide stockholder, within the meaning of the law. If, after the stock is pledged, it is allowed to remain upon the books of the corporation in the name of the real owner, he, and not the pledgee, will have the right to vote the stock. (Decided by the Supreme Court in the case of Smith vs. S. F. and N. P. Railway Company, which decision is printed in Volume 115 of the California Reports, page 584.)

Section 966.—WHO MAY VOTE STOCK IN HANDS OF TRUSTEE.—Where stock is held by a Trustee, he is entitled to vote the stock, if it has been transferred to his name on the books of the corporation ten days before the election.

Section 967.—WHO MAY VOTE STOCK IN HANDS OF ADMINISTRATOR OR EXECUTOR.—When the owner or pledgee is dead, he must be succeeded by his personal representative, that is, by his executor or administrator. In such case, the administrator or executor will have the right to have the stock transferred on the books of the corporation to him, and will be entitled to vote the stock. In the case of a Trustee who dies, the law will not allow the trust to die with him, but will proceed to appoint another Trustee to succeed him, and in this case the succeeding Trustee will be entitled to have the stock transferred to him, and may vote it.

Section 968.—WHO MAY VOTE STOCK BELONGING TO MINOR.—The guardian of a minor, the owner of stock in a corporation, is entitled to vote it.

Section 969.—WHO MAY VOTE STOCK BELONGING TO INSANE PERSON.—The guardian of the estate of an insane person, the owner of stock in a corporation, is entitled to vote it.

Section 970.—VOTING BY PROXY.—A stockholder may be represented at all elections by proxy. He may select any one he pleases as his proxy, to vote his stock, and the person selected by him need not himself be a stockholder. A corporation has no power to restrict the right of voting by proxy to certain persons, or to control their selection by the stockholder in any way, or to curtail in any other respect the right to vote by proxy. There was for a long time in California a custom among banking corporations to have a By-Law providing that no person not a stockholder would be allowed to vote as a proxy, but the Supreme Court has declared such a By-Law invalid, upon the ground that a corporation has no power to make or enforce it. The law places no restriction whatever upon the stockholder as to the person he shall be at liberty to select to act under his proxy; and a corporation has no power to either qualify or limit the right to vote by proxy. (Decided by the Supreme Court in the case of People's Home Savings Bank vs. Superior Court, which decision is printed in Volume 104 of the California Reports, page 649.) A new section has been added to the Civil Code (in force April 27, 1905), regulating the giving and use of proxies. The law provides that every proxy must be executed in writing by the stockholder himself, or by his duly authorized attorney. No proxy given or made prior to February 27, 1905, will be valid after the expiration of eleven months from said date, unless the length of time for which it is to continue is specified in the proxy itself; and the time, when specified, must be for some limited period, in no case to exceed seven years from the date of the proxy. A proxy hereafter given is valid for eleven months after its date, unless the time, not exceeding seven years, is specified in it.

Every proxy is revocable at the pleasure of the person executing it. (Act of the Legislature, approved February 27, 1905.)

Civil Code, Section 312; Statutes of 1905, page 22.

Section 971.—ORGANIZATION OF BOARD OF DIRECTORS.—Immediately after their election, the Directors must organize by the election of a President, a Secretary, and a Treasurer.

Civil Code, Section 308.

Section 972.—DUTIES OF PRESIDENT, SECRETARY, AND TREASURER.—The duties of the President, the Secretary, and the Treasurer may be prescribed by the corporation in its By-Laws. They may be required to perform any duty consistent with the objects of the corporation and not inconsistent with the laws of the State.

Section 973.—OTHER OFFICERS.—A corporation may appoint other officers than those named by the law, and prescribe what their duties shall be. Such officers may be provided for in the By-Laws, and appointed by the Board of Directors.

Section 974.—QUORUM OF DIRECTORS.—A majority of the Board of Directors constitutes a quorum for the transaction of business. Unless a quorum is present and acting, no business performed, or act done, is valid, as against the corporation. No legal quorum of a Board of Directors is present when action is attempted to be taken on a matter as to which one of the Directors necessary to make the quorum is interested; and resolutions passed at such a meeting cannot be ratified by the stockholders.

Civil Code, Section 305.

Section 975.—DIRECTOR CANNOT VOTE ON MATTER IN WHICH HE IS INTERESTED.—A Director of a corporation cannot legally vote or act upon any matter

in which he is financially interested adversely to the corporation. By virtue of his position, he is disqualified from voting or in any mode acting in his official capacity as a Director, for the purpose of creating an obligation in his own favor. So strictly is this principle adhered to by the courts, that no question is allowed to be raised as to the fairness or unfairness of the contract so entered into. A Director must not participate in any act in which his personal interest is antagonistic to that of the corporation. Being interested in the subject-matter, the law does not allow him, as a Director, to deal with himself, and thus be subjected to the temptation to advance his own interests. The Supreme Court of California had under consideration a case where a Director named Wells formed a part of a quorum, at a meeting of the Board, which voted the execution of a mortgage on the property of the corporation to him; and the Court held that the mortgage was invalid, saying: "The same rules which preclude an interested Director from uniting with other Directors in the creation of an obligation in favor of himself by his vote forbid him from uniting with them in creating such obligation by any act or exercise of his official position; and a meeting at which there is not a majority of the Directors, exclusive of such interested Director, is not a competent Board for the transaction of any corporate business. By reason of the disqualification of Wells from taking any part in passing the resolution for executing the note and mortgage to himself, he could neither vote in favor of the resolution, nor by his presence help to create a quorum by which the other two Directors could adopt it. For the purpose of any action upon this resolution, he was as much a stranger to the Board as if he had never been elected a Director; and, although he may have been physically present in the room with the other two Directors, he was not for that purpose a competent part of the Board, any more than would have been any other bystander, and there was not, therefore, a quorum of the Board 'present and acting' at

the time the resolution was adopted." (Decided by the Supreme Court in the case of Curtin vs. Salmon River Hydraulic Gold Mining Company, which decision is printed in Volume 130 of the California Reports, page 345.)

Section 976.—REGULAR AND SPECIAL MEETINGS.—The time of holding the meetings of the Board of Directors may be fixed in the By-Laws, and the By-Laws may provide that no notice be given of regular meetings. Where a special meeting is called, for any purpose, all of the Directors must be notified by the Secretary in the proper manner. If the meeting is special, and the Directors are not all notified, the meeting is not duly assembled, and its action does not bind the corporation as a valid corporate act.

Section 977.—PUBLICITY CANNOT MAKE ILLEGAL ACT OF DIRECTORS VALID.—The publicity alone of an illegal and unauthorized act of the Directors of a corporation does not make it valid; and Directors charged with doing an illegal act cannot defend it by saying that their act was open, and not secret.

Section 978.—VACANCY IN BOARD OF DIRECTORS.—The By-Laws of a corporation may provide the manner in which a vacancy in the Board of Directors shall be filled. If the By-Laws make no provision for filling a vacancy, the Board of Directors must appoint a member to fill the vacancy.

Civil Code, Section 305.

Section 979.—CAN A CORPORATION PERFORM CORPORATE ACTS, SUCH AS THE MORTGAGING OF ITS REAL PROPERTY, WHILE THERE IS A VACANCY IN ITS BOARD OF DIRECTORS?—This question was a new one in the United States prior to the year 1899. In that year the Supreme Court of California made a decision in a case where this question was directly

raised, (where there was a vacancy in a Board of five, and the remaining four members, without filling the vacancy, undertook to authorize a mortgage of the corporation's real estate), holding that a vacancy in the Board does not prevent it from acting so as to bind the corporation, if there is a majority of a full Board remaining. Chief Justice Beatty, giving the decision of the Court, said on this subject: "The By-Laws of this corporation, and, I suppose, its Articles of Incorporation, provided for a Board of five Directors, and the question is whether during a vacancy in one of these directorships the four remaining Directors could lawfully assemble for the transaction of any business except the filling of such vacancy. Counsel have not cited any case decided in this State or any other in the United States in which this question has been directly decided. It is no doubt true that Directors owe to their constituents the duty of keeping the Board full, by promptly filling vacancies as they occur; and this for the reason that shareholders are entitled to the benefit of the experience and advice of all the members of a full Board in the transaction of all its business. When the Directors violate this duty, there may be sound reasons for holding that they should not be allowed to take any advantage, as against the shareholders, of acts or resolutions passed when a full Board was not in existence. But when the corporation is dealing with a stranger, who, acting in good faith and in ignorance of the existence of a vacancy in the Board of Directors, parts with his property on the faith of what he is induced to believe is a valid corporate obligation, the case is certainly very different in its substantial merits. The votes of a majority of a full Board may authorize a corporate act, although there may be a vacancy in the Board." (Decided by the Supreme Court in the case of Porter vs. Lassen County Land and Cattle Company, which decision is printed in Volume 127 of the California Reports, page 661.)

Section 980.—SERVICES OF DIRECTOR OUTSIDE OF HIS DUTIES AS SUCH.—Where a Director of a corporation performs services as its manager, or in any other legitimate way, not pertaining to his duties as Director, he is entitled to recover from the corporation the reasonable value of such services, though no rate of compensation was fixed by the Board of Directors prior to performance of the services. (Decided by the Supreme Court in the case of Bassett vs. Fairchild, which decision is printed in Volume 132 of the California Reports, page 631.)

Section 981.—LIABILITY OF DIRECTORS FOR MONEY EMBEZZLED.—The Directors of a corporation are individually and personally liable to its creditors for money embezzled by any of the officers of the corporation. This the Constitution of the State declares. But they are liable only to all the creditors, and one creditor cannot sue alone to recover his debt by reason of failure to pay when the funds of a corporation have been embezzled. All the creditors must be joined in such a suit, and the money recovered to the corporation from the Directors will constitute a trust fund to be paid to all the creditors.

Section 982.—ADVANCES OF MONEY BY DIRECTOR.—Where money is advanced to a corporation by a Director, when the corporation is in debt and unable to obtain money from other sources, and such money is received and made use of in the business of the corporation, it will be liable to him for the repayment of the sum advanced.

Section 983.—DIRECTORS IN TWO CORPORATIONS.—The fact that two corporations have the same Directors, or that some of the Directors in one are also Directors in the other, does not prevent the two corporations from dealing with each other. Where two corporations, through their Boards of Directors, make a contract with each other, the Directors who are common to both

are not within the rule which prohibits one who acts in a fiduciary capacity from dealing with himself. Two corporations have the right, within the scope of their chartered powers, to deal with each other; and this right is not destroyed by the fact that some, or even a majority, of the Directors are common to both. Of course, if such Directors should wrongfully use their powers to the prejudice of one of the corporations, their action could be set aside for fraud. But common Directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either; and therefore their acts as such common Directors are not void.

Section 984.—AUTHORITY OF PRESIDENT.—The President of a corporation may have more extensive powers conferred upon him than a strict interpretation of the law would show. The Directors of a business corporation have power, by resolution, to give the President general authority to incur debts, negotiate loans, enter into contracts, and otherwise act as the agent of the corporation; and where a resolution of this kind is passed at a meeting of the Directors, unless it is in direct conflict with the By-Laws, the President will have authority to do all such acts on behalf of the corporation as are mentioned in the resolution. (Decided by the Supreme Court in the case of McCormick vs. Stockton and Tuolumne County R. R. Company, which decision is printed in Volume 130 of the California Reports, page 100.)

Section 985.—PRESIDENT MAY EMPLOY ATTORNEY.—The President of a corporation has power to employ an attorney, when the exigencies of his company require it. He need not obtain the consent of the Directors or stockholders to do this. By virtue of his position as official head of the corporation he has the power to do so.

Section 986.—DIVIDENDS.—The Directors of a corporation cannot make dividends, except from the surplus

profits arising from the business. The Directors cannot withdraw, divide, or pay to the stockholders, or any of them, any part of the capital stock, while the corporation is a going concern.

Civil Code, Section 309.

Section 986a.—AGREEMENT TO DIVIDE CAPITAL STOCK AMONG STOCKHOLDERS VOID.—An agreement upon the part of a corporation to divide its whole capital stock among its stockholders, prior to its dissolution, is void.

Where a corporation wrongfully pays to some of its stockholders their proportionate share of the money received from the sale of the entire property of the corporation, the remedy of a stockholder who has not been paid is to compel the restoration of the funds illegally distributed.

(Decided by the Supreme Court of California, in the case of Tapscott vs. Mexican Colorado River Land Company, which decision is printed in California Decisions, Volume 35, page 598.)

Section 987.—EXTENT OF DEBTS TO BE CREATED.—The Directors of a corporation have no power to create debts beyond the amount of the subscribed capital stock. If they create debts beyond the capital stock, the Directors are individually, jointly, and severally liable to the corporation and the creditors for such debts. A Director, however, who is not present at the meeting when the debt is created, or who has his dissent to the Board's action entered on the minutes, will not be liable.

Civil Code, Section 309.

Section 988.—RECORDS OF CORPORATION.—All corporations for profit in California are required by the law to keep a record of all their business transactions; a journal of all meetings of their Directors, members, or stockholders, with the time and place of holding the same,

whether regular or special, and if special, its object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done; who were present, and who absent; and, if requested by any Director, member, or stockholder, the time shall be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request, the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, the protest of any Director, member, or stockholder, to any action or proposed action, must be entered in full. All such records must be open to the inspection of any Director, member, stockholder, or creditor of the corporation. Corporations for profit must also keep a book, to be known as the "Stock and Transfer Book," in which must be kept a record of all stock; the names of the stockholders, or members, alphabetically arranged; installments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale, or transfer of stock made, the date thereof, and by and to whom; and all such other records as the By-Laws prescribe. Such "Stock and Transfer Book" must be kept open to the inspection of any stockholder, member, or creditor.

Civil Code, Section 377, 378.

Section 989.—REMOVAL OF DIRECTORS FROM OFFICE.—No Director can be removed from office, unless by a vote of two-thirds of the members, or of stockholders holding two-thirds of the capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal. Meetings of stockholders for this purpose may be called by the President or by a majority of the Directors, or by members or stockholders holding at least one-half of the votes. Such calls must be in writing, and addressed to the Secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. If the Secretary refuse to give the notice, or if there is no Secretary, the call may be addressed directly to the members or

stockholders, and be served as a notice, in which case it must specify the time and place of meeting.

Section 990.—EXAMINATION OF CORPORATIONS.—As the right of corporations to exist and do business comes from the State, it follows logically that the State retains the power to examine into the affairs of all corporations at any time. The law provides that the Governor may require the Attorney-General, or the District Attorney of any county, to make an examination into the affairs of a corporation and report to the Governor. The Legislature may also examine into the condition and affairs of a corporation, by a committee appointed by either the Senate or Assembly. And the Legislature may dissolve all corporations by repealing the laws under which they were created.

Civil Code, Sections 382, 383, 384.

Section 991.—DISSOLUTION OF CORPORATION.—The dissolution of a corporation may be voluntary, or involuntary. It is voluntary, when the dissolution is effected by consent of the stockholders or members. It is involuntary, when the dissolution is compelled against or without the consent of the stockholders or members. If voluntary, an application is made to the Superior Court of the county where the principal place of business of the corporation is. This application to the Court must first be authorized by a resolution of the members or stockholders, adopted by a two-thirds vote of the members, where there is no capital stock, or by a vote of the holders of two-thirds of the subscribed capital stock; and it must also appear that all claims and demands against the corporation have been paid and discharged. A corporation may also be dissolved against the consent of the stockholders by a judgment of dissolution in a suit brought by the Attorney-General. In such a suit, if it appears that the corporation is doing a business not provided for by its charter, or has ceased to do business at all, or its term of existence has

expired, or is in such a condition that it can no longer hope to carry out the ends and purposes of the corporation, the corporation will be declared dissolved by judgment of the Court.

Code of Civil Procedure, Sections 803, 1227, 1228.
Act of the Legislature, in effect May 17, 1907.

Section 992.—DISPOSITION TO BE MADE OF PROPERTY UPON DISSOLUTION.—Upon the dissolution of a corporation, the capital stock, and all property belonging to the corporation, will be divided among the stockholders in proportion to the number of shares held by each. But before any such division can be made, it must appear that all debts of the corporation have been paid. The Directors of a dissolved corporation have authority to go on and make final settlement of its affairs, and have power to make a division of the property left over after the payment of the debts.

Civil Code, Section 309.

Section 993.—FALSE REPORTS.—Any officer of a corporation who wilfully gives a certificate, or wilfully makes an official report, public notice, or entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, is liable for all the damages resulting therefrom to any person injured thereby; and if two or more officers unite or participate in the commission of any of such acts, they are jointly and severally liable.

Civil Code, Section 316.

Section 994.—TRANSFER OF FRANCHISE.—No sale, lease, assignment, transfer, or conveyance of the business, franchise, and property, as a whole, of any corporation is valid without the consent of stockholders holding of record at least two-thirds of the issued capital stock of the corporation; such consent to be either expressed in writing,

executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer, or conveyance, or by a vote at a stockholders' meeting called for that purpose; but with such assent so expressed, such sale, lease, assignment, transfer, or conveyance is valid.

Statutes of 1903, page 396.

Section 995.—TRANSFER OF FOREIGN CONCESSIONS.—A corporation owning grants, concessions, franchises, and property, in a foreign country, has the right under our laws to sell and convey the same; but such sale and conveyance can only be made by a resolution adopted by the vote of a majority of the Board of Directors, and the written consent of the holders of two-thirds of the capital stock.

Statutes of 1899, page 95.

Section 996.—GENERAL POWERS OF CORPORATION.—The law provides what shall be the general powers of a corporation in California. Every corporation in California has power, (1) To sue and be sued in any court; (2) To make and use a common seal, and alter the same at pleasure; (3) To purchase, hold, and convey such real and personal estate as the purpose of the corporation may require; (4) To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation; (5) To make By-Laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock; (6) To admit stockholders or members, and to sell their stock or shares for the payment of assessments or installments; (7) To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purpose of the corporation. The manner of the exercise of these general powers has already been stated in preceding sections.

Civil Code, Section 354.

Section 997.—TAXATION OF CORPORATIONS.—Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations (except the property of national banking associations not assessable by Federal statute) can be assessed and taxed. But no assessment can be made of shares of stock in any corporation (except in national banking associations, whose property, other than real estate, is exempt from assessment by Federal statute).

Statutes of 1899, page 96.

Section 998.—LAWS APPLYING TO PARTICULAR CORPORATIONS.—There are certain laws which apply to particular corporations, and which qualify in important provisions the general laws stated in preceding Sections of this book. In following Sections will be found a statement of laws applying to particular corporations. It must not be understood, however, that the general laws do not apply to the corporations named; for all the general laws do apply to all corporations, but qualified and limited by the application of laws applying to particular corporations.

Section 999.—BANKING CORPORATIONS.—The Legislature of 1909 passed a new Bank Act, in effect July 1st, 1909, substantially as follows:

(a)—Division of Banks Into Classes.—The word "bank" as used in this act includes every person, firm, company, copartnership or corporation which conducts the business of receiving money on deposit. Banks are divided into the following classes:

(a) Savings banks;
(b) Commercial banks; and
(c) Trust companies.

The term "savings bank," when used in this act, means a bank organized for the purpose of accumulating and loaning

the funds of its members, stockholders, and depositors, and which may loan and invest the funds thereof, receive deposits of money; loan, invest and collect the same with interest; and may repay depositors with or without interest, and having power to invest said funds in such property, securities and obligations as may be prescribed by this act; and to declare and pay dividends on its general deposits, and a stipulated rate of interest on deposits made for a stated period or upon special terms.

The term "commercial bank," when used in this act, means any bank authorized by law to receive deposits of money, deal in commercial paper or to make loans thereon, and to lend money on real or personal property, and to discount bills, notes, or other commercial paper, and to buy and sell securities, gold and silver bullion, or foreign coins or bills of exchange.

The term "trust company," when used in this act, means any company which is incorporated for the purpose of conducting the business of acting as executor, administrator, guardian of estates, assignee, receiver, depositary, or trustee.

(b)—Foreign Corporations.—No foreign corporation shall transact a banking business in this State without first complying with all the requirements of the laws of this State relative to banks as defined in this act, and without having the capital paid up in this State as required by this act. And no such foreign corporation shall transact any banking business in this State until it has executed and filed with the Superintendent of Banks a written instrument appointing such superintendent, or his successor in office, its true and lawful attorney, upon whom all process in any action or proceeding by any resident of the State against it may be served, with the same effect as if such corporation was formed under the laws of this State and had been lawfully served with process therein. Service in favor of a resident of this State upon such attorney shall be deemed personal service on such corporation. The Superintendent of Banks shall forthwith forward by mail a copy of every process

served upon him under the provisions of this section, postage prepaid, and directed to the secretary of such corporation, at its last known post office address. For each copy of process, the Superintendent of Banks shall collect the sum of two dollars, which shall be paid by the plaintiff or moving party at the time of such service, to be recovered by him as part of his taxable costs if he succeed in the suit or proceeding.

Every corporation, at the time it applies for a certificate to do a banking business, must file with the Superintendent of Banks a certified copy of its articles of incorporation, or of the statute chartering such corporation, also all instruments amending or altering such articles of incorporation or charter. Thereafter all amendments and certificates shall likewise be so filed before such instruments take effect. In like manner all copartnerships shall file certified copies of their articles of copartnership and all amendments thereto.

(c)—Branch Banks.—No bank in this State, or any officer or director thereof, shall hereafter open or keep an office other than its principal place of business, without first having obtained the written approval of the Superintendent of Banks to the opening of such branch office, which written approval may be given or withheld in his discretion, and shall not be given by him until he has ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch office; and, provided further, that no bank or any officer or director thereof, shall open or maintain such branch unless the capital of such bank, actually paid in cash, shall exceed the amount required by this act by the sum of twenty-five thousand dollars for each branch office opened and maintained. Every bank, and every such officer or director violating the provisions of this section shall be guilty of a misdemeanor.

(d)—Bank Directors.—No person shall be eligible for election as a director of a bank unless he is a stockholder of the bank, owning, in his own right, shares thereof of the actual market value of at least five hundred dollars; and

every person elected to be director who, after such election, shall cease to be the owner in his own right of the amount of stock aforesaid, shall then cease to be a director of the bank, and his office shall then become vacant. If a bank be organized without capital stock, no person shall be eligible as a director thereof unless he is both a member and a depositor of such bank.

Each director of a bank, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such bank, and will not knowingly violate or wilfully permit to be violated any of the provisions of law applicable to such bank, and that he is the owner in good faith and in his own right of the shares of stock of the actual market value required by this act, subscribed by him or standing in his name on the books of the bank, and that the same is not hypothecated or in any way pledged as security for any loan or debt; and, in case of re-election or re-appointment, that such stock was not hypothecated or in any way pledged as security for any loan or debt during his previous term. Such oath shall be subscribed by the director making it, and certified by the officer before whom it is taken; and shall be immediately transmitted to the Superintendent of Banks, and filed and preserved in his office.

(e)—Unincorporated Bankers.—Every person or number of persons, not being incorporated, engaged in the business of banking or publicly receiving money on deposits, must conduct such business under a name which shows the true name of all persons engaged therein, unless such person or persons are doing business as a special partnership.

(f)—Advertising.—No bank, or any officer thereof, shall advertise in any manner, or publish any statement of the capital authorized or subscribed, unless it or he advertise and publish, in connection therewith, the amount of capital actually paid up. Any bank, or any officer thereof, advertising in any manner, or publishing any statement of such capital, authorized or subscribed, without a statement in

connection therewith of the capital actually paid up, shall be guilty of a misdemeanor.

(g)—**Deposits of Dead Persons.**—The president or managing officer of every bank must, within fifteen days after the first day of January of every odd numbered year, return to the Superintendent of Banks a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding ten years. Such statements shall show the amount of the account, the depositor's last known place of residence or post office address, and the fact of death, if known to such president or managing officer. Such president or managing officer must give notice of these deposits in one or more newspapers published in or nearest to the town or city where such bank has its principal place of business, at least once a week for four consecutive weeks, the cost of such publication to be paid pro rata out of such unclaimed deposits. This section does not apply to any deposit made by or in the name of a person known to the president or managing officer to be living, or which, with the accumulation thereon, is less than fifty dollars. The Superintendent of Banks must incorporate in his subsequent report such returns made to him as provided in this section. Any president or managing officer of any bank who neglects or refuses to make the sworn statement required by this section shall be guilty of a misdemeanor.

(h)—**Deposits by Married Women or Minors.**—When any deposit with a bank shall be made by or in the name of any married woman or minor, the same shall be held for the exclusive right and benefit of such depositor, and free from the control or lien of all other persons, except creditors, and shall be paid, together with the dividends, if any, and interest, if any, thereon to the person in whose name deposits shall have been made, and the receipt or acquittance of such minor shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the bank. When any deposit

with a bank shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to such bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest, if any, thereon, may be paid to the person for whom the deposit was made. When a deposit with a bank shall be made by any person in the names of such depositor and another person or persons, and in form to be paid to either or the survivor or survivors of them, such deposit thereupon, and any additions thereto made by either of such persons upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of all or any or to the survivor or survivors after the death of one or more of them, and such payments and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit.

The surviving husband or wife of any deceased person, or, if no husband or wife is living, then the children of such decedent, and if no children are living, then the father or mother of such decedent, may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit in such bank at the time of his or her death; provided, such deposit shall not exceed the sum of five hundred dollars. Any bank, upon receiving an affidavit stating that said depositor is dead, and that affiant is the surviving husband or wife, as the case may be, or stating that decedent left no husband or wife, and that affiant is, or affiants are, the children, or the father or mother, of said decedent, and that the whole amount that decedent left on deposit in any and all banks of deposit in this State does not exceed the sum of five hundred dollars, may pay to said affiant or affiants any deposit of said decedent, if the same

does not exceed the sum of five hundred dollars, and the receipt of such affiant is sufficient acquittance therefor.

(i)—List of Stockholders.—Every bank now in existence or hereafter organized shall keep in its offices, in a place accessible to the stockholders, depositors, and creditors thereof, and for their use, a book containing a list of stockholders in such corporation, and the number of shares of stock held by each; and every such bank shall keep posted in its office, in a conspicuous place, accessible to the public generally, a notice signed by the president or secretary, showing:

1. The names of the directors of such bank.

2. The number and par value of the shares of stock held by each director.

The entries on such book and such notice shall be made and posted within twenty-four hours after any transfer of stock, and shall be prima facie evidence against each director and stockholder of the number of shares of stock held by each.

Every copartnership doing a banking business shall keep in its office, in a place accessible to the partners and depositors and the creditors thereof, a list of the partners and the capital paid into the copartnership of each partner.

(j)—Capital and Reserve.—The aggregate of paid-up capital, togther with the surplus, of every bank, must equal ten per centum of its deposit liabilities; such deposit liabilities shall not be increased when such proportion of paid-up capital and surplus is wanting, and in no event shall said paid-up capital be less than the minimum paid-up capital provided by this act. And, provided also, that no savings bank shall be required to have a paid-up capital and surplus of more than one million dollars, or if organized without a capital stock, a reserve fund of more than one million dollars.

Every bank, other than a savings bank, shall at all times have on hand, in lawful money of the United States, gold and silver coin, gold certificates or silver certificates, an amount equal to fifteen per centum of the aggregate amount

of its deposits, exclusive of State, county and municipal deposits. The amount thus to be kept on hand shall be called its lawful money reserve. Three-fifths of such lawful money reserve of any bank other than a savings bank may consist of moneys on deposit subject to call with any bank or banks other than a savings bank in this State; provided, that every bank receiving deposits of other banks shall maintain as a lawful money reserve at least twenty per centum of the aggregate amount of its deposits, exclusive of State, county and municipal deposits. If the lawful money reserve of any bank shall be less than the amount required by this section, such bank shall not increase its liability by making any new loans or discounts, otherwise than by discounting bills of exchange payable on sight, or making any dividends from profits until the full amount of its lawful money reserve has been restored. The Superintendent of Banks may notify any bank, whose lawful money reserve shall be below the amount herein required, to make good such reserve; and, if it shall fail for thirty days thereafter to make good such reserve, such bank shall be deemed insolvent and may be proceeded against under the provisions of this act.

The directors of banks having a capital stock may, at such times and in such manner as the by-laws prescribe, declare and pay dividends to depositors and stockholders of so much of the profits of the bank, and of the interest arising from the capital and deposits, as may be appropriated for that purpose under the by-laws or under their agreements with depositors, but every such bank shall, before the declaration of such dividend, carry at least one-tenth (1-10) part of the net profits of the stockholders for the preceding half year to its surplus or reserve fund until the same shall amount to twenty-five per centum of its paid-up capital stock. But the whole or any part of such surplus or reserve fund, if held as the exclusive property of stockholders, may at any time be converted into paid-up capital stock, in which event such surplus or reserve fund shall be restored in manner as above provided until it amounts to twenty-five per centum of the

aggregate paid-up capital stock. A larger surplus or reserve fund may be created, and nothing herein contained shall be construed as prohibitory thereof. The capital and the assets of the bank are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders.

Any corporation authorized by its articles of incorporation so to do, may combine the business of a commercial bank and savings bank and trust company, or any or all of them.

Every bank doing a departmental business, shall have paid up in cash a capital stock of not less than twenty-five thousand dollars if it transacts both a commercial and savings business; and paid up in cash a capital stock of not less than two hundred twenty-five thousand dollars if it transacts both a commercial and trust business; and paid up in cash a capital stock of not less than two hundred twenty-five thousand dollars if it transacts both a savings and trust business; and paid up in cash a capital stock of not less than two hundred twenty-five thousand dollars if it transacts a commercial, savings and trust business. Such capital stock shall be increased from time to time in the same manner and to the same extent as provided for in this act.

Every bank, before it commences to do business or before it opens a new department and commences to transact business in or under such new department, shall obtain the certificate of the Superintendent of Banks for the opening of each of the departments specified. Each certificate herein provided for shall be given when the superintendent shall, by the examination required by this act, have satisfied himself that the proper amount of cash has been paid in as capital and the provisions of this act complied with. The applicant shall pay for such certificate a fee of fifty dollars.

Every bank shall maintain for each department a lawful money reserve equal in amount to that required by this act for the respective business conducted, and shall keep

separate and distinct the lawful money reserve of any department from that of any other department; and all deposits made with other banks, whether temporary or otherwise, shall be assets of the respective departments by which they were made, and shall be so carried on the books of such other banks, and shall be repaid only upon the order of the department to whose credit they stand.

No department shall receive deposits of any other department of the same corporation; provided, however, that any bank having departments shall have the right to sell and transfer any bonds, securities or loans from one department to another upon receipt of the actual value thereof, if such bonds, securities or loans are a legal investment for the department purchasing the same under the provisions of this act.

(k)—Departments.—Every bank having different departments shall keep separate books of account for each department of its business, and shall be governed as to all deposits, reserves, investments and transactions relating to each department by the provisions in this act specifically provided for the respective kind of business.

It shall keep all investments relating to the savings department entirely separate and apart from the investments of its other department or departments.

Every bank shall conduct the business of all its departments in one building, or in adjoining buildings, and shall keep entirely separate and apart in each department the cash, securities and property belonging to such department, and shall not mingle the cash, securities and property of one department with that of another.

All money belonging to each department, whether cash on hand or with other banks, and the investments made, shall be held solely for the repayment of the depositors in said department, until all depositors of such department shall have been paid, and the overplus then remaining shall be applied to the other liabilities of such bank.

Every individual, firm or corporation doing a banking business in this State must, on all its window-signs and in advertising, and on letterheads and other stationery on which its business is transacted, use the word "savings" if it conducts a savings business, or the word "trust" if it conducts a trust department, and the word "commercial" if it conducts a commercial department.

Every corporation heretofore created under the laws of this State, doing a banking business therein, and which has no capital stock, may elect to have a capital stock, and may issue certificates of stock therefor; provided, that no such corporation shall use or convert any moneys or funds theretofore belonging to it, or under its control, into capital stock; but such funds or moneys must be held and managed only for the purposes and in the manner for which they were created. Before such change is made, a majority of the members of such corporation present at a meeting called for the purpose of considering the proposition whether it is best to have a capital stock, its amount, and the number of shares into which it shall be divided, must vote in favor of having a capital stock, fix the amount thereof, and the number of shares into which it shall be divided. Notice of the time and place of holding such meeting, and its object, must be given by the president of such corporation by mailing notice of such meeting to each member of such corporation at his last known post office address at least ten days prior to the day fixed for such meeting, and by publication in some newspaper printed and published in the county, or city and county, in which the principal place of business of the corporation is situated, at least once a week for three successive weeks prior to the holding of the meeting. A copy of the proceedings of this meeting, giving the number of persons present, the votes taken, the notice calling the meeting, the proof of its publication, the amount of capital actually subscribed, and by whom, all duly certified by the president and secretary of the corporation, must be filed in the office of

the Secretary of State and clerk of the county where the articles of incorporation are filed. Thereafter such corporation is possessed of all the rights and powers, and is subject to all the obligations, restrictions, and limitations, as if it had been originally created with a capital stock.

Any bank may conduct a safe deposit department, but shall not invest more than one-tenth of its capital and surplus in such safe deposit department.

(l)—**Sale of Assets.**—Any bank may sell the whole or any portion of its assets to any other bank which may purchase its assets after obtaining the consent of the stockholders of the selling and of the purchasing bank holding of record at least two-thirds of the issued capital stock of each of such corporations; such consent to be expressed either in writing executed and acknowledged by such stockholders and attached to the instrument of sale, or to a copy thereof, or by vote at a stockholders' meeting of such banks called for that purpose.

The selling and purchasing banks may for such purposes enter into an agreement of sale and purchase, which agreement shall contain all the terms and conditions connected with the sale and purchase of its assets.

Such agreement shall contain proper provision for the payment of liabilities of the selling bank, and in this particular shall be subject to the approval of the superintendent of banks; and shall not be valid until such approval is obtained. Such agreement may contain provisions for the transfer of all deposits to the purchasing bank, subject, however, to the right of every depositor of the selling bank to withdraw his deposit in full on demand after such transfer, irrespective of the terms under which it was deposited with the selling bank.

(m)—**General Regulations.**—Any bank receiving trust funds in accordance with the provisions of this act relating to trust companies must not mingle such trust funds with the other assets of the corporation, and such funds shall

not be carried or counted as any part of the lawful reserve provided for in this act. The officers of any bank who knowingly violate or consent to the violation of this provision shall be guilty of a felony.

No officer or employee of any bank shall, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such bank, nor shall he nor any director become an indorser or surety for loans to others nor in any manner be obligor for moneys borrowed or loaned by such bank. The office of any officer or employee who acts in contravention of the provisions of this section shall immediately become vacant, and he shall be guilty of a misdemeanor.

No bank shall purchase or invest its capital or money of its depositors, or any part of either, in the shares of its own capital stock; nor loan its capital or the money of its depositors, or any part of either, on the shares of its own capital stock, unless such purchase or loan shall be necessary to prevent loss on debts previously contracted in good faith.

Stock thus purchased or carried shall, within six months from the time of its purchase, be sold or disposed of at public or private sale.

The officers of any bank who knowingly violate or consent to the violation of this provision shall be guilty of a felony.

No director, or officer, or employee, or controlling stockholder of any bank shall, directly or indirectly, for himself or as the partner or agent of others, sell or transfer, or cause to be sold or transferred to the bank of which he is a director, officer, employee, or controlling stockholder, any mortgage on real estate or contract arising from the sale of real estate made by any corporation or syndicate in which such director or officer, or employee, or controlling stockholder is personally or financially interested, without the consent in writing of the superintendent of banks.

Any director, or officer, or employee, or controlling stockholder of any bank who knowingly violates or consents to

the violation of this provision shall be deemed guilty of a felony.

No bank receiving deposits of money shall purchase, agree to purchase, underwrite or guarantee any bond issue in excess of five per centum of its assets, except bonds of the United States, of the State of California, of the cities, cities and counties, counties or school districts of this State.

No bank shall purchase, or invest its capital or money of its depositors, or any part of either, in shares of corporations, unless such purchase shall be necessary to prevent loss on debts previously contracted in good faith, and stock thus purchased or carried shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, unless permission to hold said stock for a longer period shall be obtained from the superintendent of banks.

The officers of any bank who knowingly violate or consent to the violation of this provision shall be deemed guilty of a felony.

A director, officer, agent, or employee of any bank who,

First—Knowingly receives or possesses himself of any of its property otherwise than in payment for a just demand, and with intent to defraud, omits to make or to cause or direct to be made a full and true entry thereof in its books and accounts; or,

Second—Concurs in omitting to make any material entry thereof; or,

Third—Knowingly concurs in making or publishing any written report, exhibit or statement of its affairs or pecuniary condition containing any material statement which is false; or,

Fourth—Having the custody or control of its books, wilfully refuses or neglects to make any proper entry in the books of such corporation as required by law, or to exhibit or allow the same to be inspected and extracts to be taken therefrom by the superintendent of banks, his chief deputy or any of his examiners, shall be guilty of a felony.

Any officer, director, agent, teller, clerk, or employee of any bank who either,

First—Knowingly overdraws his accounts with such bank, and thereby obtains the money, notes or funds of any such bank; and,

Second—Asks or receives or consents or agrees to receive any commissions, emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, for procuring or endeavoring to procure for any person, firm or corporation any loan from, or the purchase or discount of any paper, note, draft, check or bill of exchange, by such bank, or for permitting any person, firm or corporation to overdraw any account with such bank, is guilty of a felony.

No bank mentioned in this act shall make any contract with any of its depositors whereby the stockholders' liability provided for by the constitution of this State is in any manner waived, and if any such contract shall be so made, such contract shall be void.

No director, officer, agent, or servant of any bank shall, directly or indirectly, for his own personal benefit, purchase or be interested in the purchase of any of the obligations of said bank for a less sum than shall appear upon the face thereof.

No director, officer, agent, or servant of any bank shall, directly or indirectly, for his own personal benefit, purchase or be interested in the purchase of any of the assets of said bank, for a less sum than the current market value thereof. Every person violating the provisions of this subdivision shall be guilty of a misdemeanor.

No bank shall deposit any of its funds with any other bank, unless such other bank has been designated as a depositary for its funds by the vote of a majority of the directors or trustees of the bank making the deposit, exclusive of the vote of any director or trustee who is an officer, director, or trustee of the depositary so designated.

No bank shall hereafter make a loan secured by the stock of another bank, if by making such loan the total stock of such other bank held by such loaning bank as collateral will exceed in the aggregate ten per centum of the capital stock of such other bank; provided, that no loan upon the capital stock of any bank shall be made unless such bank has been in existence for two or more years and has earned and paid a dividend upon its capital stock.

Interest unpaid, although due or accrued, on debts owing to any bank, shall not be included in calculation of its profits previous to a dividend.

No bank shall invest or loan more than five per centum of its assets in any one bond issue, except bonds of the United States, of the State of California, of the counties, cities and counties, cities or school districts of this State.

No bank shall make any loan on real estate except it be a first lien, but this provision shall not prevent the acceptance of a second lien to secure the payment of a debt previously contracted in good faith.

(n)—Examination of National Banks. — Any national bank of this State receiving the deposits of banks organized and conducting business under this act, must, at the request of the superintendent of banks, submit to an examination by him, or his duly appointed examiners, should the superintendent of banks in his discretion deem it necessary or desirable that such examination be made; and the expense of such examination shall be paid by such national bank; and if any such national bank shall refuse to permit such examination to be made by the superintendent of banks, then the superintendent of banks shall notify in writing any and all banks depositing its funds with such national bank, to withdraw its deposits therefrom, and such bank shall comply with such order, and failure so to do shall be a misdemeanor.

Every bank shall post in a conspicuous place in its banking room the last certificate obtained from the superintendent

of banks. Every bank that fails to comply with the provisions of this section is guilty of a misdemeanor.

(o)—Money Belonging to Estates.—Any court having appointed and having jurisdiction of any executor, administrator, guardian, assignee, receiver, depositary or trustee, upon the application of such executor, administrator, guardian, assignee, receiver, depositary or trustee, or upon the application of any person having an interest in the estate administered upon by such officer or trustee, after notice to other parties in interest as the court may direct, and after a hearing upon such application, may authorize such officer or trustee to deposit any money then in his hands as such officer or trustee, or which may thereafter come into his hands, and until the further order of the court, in any bank organized under the laws of the State of California; and upon such deposit being made, the officer or trustee so depositing the same shall thereafter and while such moneys remain on deposit in such bank, be relieved and discharged from all liability and responsibility therefor, and the bond required of such officer or trustee given upon his appointment shall be thereupon by said Court reduced to such an amount as the Court may deem reasonable; such deposit shall be repaid only upon the orders of said Court, and shall be a preferred claim against such bank and be paid in full before any other depositor of such bank shall have been paid.

(p)—Savings Banks. — Every savings bank must have actually paid in a capital stock of not less than twenty-five thousand dollars, or, if organized without capital stock, a reserve fund of at least one million dollars, and until said sum of twenty-five thousand dollars or said sum of one million dollars shall be actually paid in, the superintendent of banks shall refuse to issue the certificate required by this act; provided that nothing herein shall be construed to affect the provisions of this act relative to the capital stock required of banks doing a departmental business.

Savings banks may purchase, hold, and convey real and personal property as follows:

1. The lot and building in which the business of the bank is carried on; such a lot and building shall not cost the savings bank an amount exceeding its capital and surplus; and the authority of a two-thirds vote of a full board of directors shall be necessary to authorize the purchase or construction thereof.

2. Such as may have been mortgaged, pledged, or conveyed to it in trust for its benefit in good faith, for money loaned in pursuance of the regular business of the corporation.

3. Such as may have been purchased at sales under pledges, mortgages or deeds of trust made for its benefit for money so loaned, and such as may be conveyed to it by borrowers in satisfaction and discharge of loans made thereon.

No savings bank shall purchase, hold, or convey real estate in any other case or for any other purpose; and all real estate described in subdivision three of this section must be sold by the bank within ten years after the title thereto is vested in it by purchase or otherwise, unless permission to hold said real estate for a longer period be given by the superintendent of banks in writing. Parcels of real estate not sold within ten years, or extension of said period as above provided, may be purchased by any persons or parties wanting them, at the price to be determined by arbitration of three persons appointed by the Superior Court as appraisers, at the request of the would-be purchaser.

No savings bank shall purchase, own, or sell personal property, except such as may be requisite for its immediate accommodation for the convenient transaction of its business, and mortgages on real estate, bonds, securities or evidences of indebtedness, public or private, gold and silver bullion, and United States mint certificates of ascertained value, and evidences of debt issued by the United States.

No savings bank shall purchase, hold, or convey bonds, securities, or evidences of indebtedness, public or private, except as follows:

(a) Bonds or interest-bearing notes or obligations of the United States, or those for which the faith of the United States is pledged for the payment of interest and principal.

(b) Bonds of this State.

(c) Bonds of any State in the United States that have not, within five years previous to making such investment by such bank, defaulted in the payment of any part of either principal or interest thereof.

(d) Bonds of any city, county, city and county, town, township, or school district of this State.

(e) Bonds of any city, town or county, which has in each case, at the time of the investment, more than twenty thousand inhabitants, as ascertained by the United States or State census made next preceding such investment, in any of the States of the United States, other than in the State of California, issued pursuant to the authority of any law of such States; provided, the entire bonded indebtedness of such city or county or town shall not exceed five per centum of the assessed value of the taxable property therein, including the issue of bonds in which said investment is made as shown by the last assessment preceding the investment; and provided, further, that such city, town, or county, or State in which it is situated has not defaulted in the payment of any part of either principal or interest thereon within five years previous to making such investment.

(f) First mortgage or underlying bonds of any steam railway, the income of which is sufficient to pay all operating expenses and fixed charges, and which is completed and operated, wholly or in part, in any of the States of the United States.

(g) Bonds of street railroads, water, light, light and power, gas, and other public utility and industrial corporations. All bonds authorized for investment by this section shall be secured by a mortgage or trust deed, which is, at the time of making such investment, (1) a first or underlying mortgage or trust deed of the corporation issuing said bonds, or (2) a refunding mortgage or trust deed used

to retire all prior lien mortgage debts of said corporation outstanding at the time of making said investment; provided, that the income of such corporation is sufficient to pay all operating expenses and fixed charges, and such income shall have been so sufficient for the term of three years preceding the issuance of such bonds, or that payment of its said bonds have been guaranteed by a corporation that has paid all its operating expenses and fixed charges for a period of three years prior to guaranteeing the payment of such bonds.

(h) First mortgage bonds or deeds of trust issued by real estate corporations; provided, that said bond issue shall not exceed sixty per centum of the market value of the real estate taken as security.

No savings bank shall purchase the bonds of any corporation or make a loan on the bonds of any corporation, if the franchise of such corporation expires prior to the maturity of its bonds, or if the franchise or special privilege granted to such corporation by any city, county, or city and county, expires before the maturity of such bond issue.

No savings bank shall, directly or indirectly, deal or trade in real or personal property in any other case or for any other purpose than is authorized by this act, and shall not contract any debt or liability for any purpose whatever other than for deposits, except as in this section provided.

Savings banks may pay regular depositors, when requested by them, by draft upon deposits to the credit with their banks, and charge current rate of exchange for such drafts.

No savings bank shall borrow money, or pledge or hypothecate any of its securities, except to meet the immediate demands of its own depositors, and then only in pursuance of a resolution adopted by a vote of a majority of its board of directors, duly entered upon their minutes, wherein shall be recorded the ayes and nays upon each vote; also with the written approval of the superintendent of banks, and he shall have the authority to fix the amount to be borrowed,

and the term and rate of interest thereon; provided, however, that savings banks may, in the manner authorized by law, and without the written approval of the superintendent of banks, borrow the public moneys of the State, counties, cities and counties, and towns, and receive such public moneys on deposit.

Savings banks may issue general certificates of deposit, which are transferable, as in other cases, by indorsement and delivery; may issue, when requested by the depositor, special certificates, acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferred only on the books of the bank; payment thereafter made by the bank to the depositor named in such certificate, or to his assignee named upon the books of the bank, or in case of death, to the legal representative of such person, of the sum for which such special certificate was issued, shall discharge the bank from all further liability on account of the money so paid.

All time certificates of deposit, issued by a savings bank, shall be subject to the same limitations and conditions as applied to other deposits, and notice thereof shall be given by the words, "Subject to conditions of agreement with depositors," printed on the face of the certificate issued.

Savings banks may prescribe by their by-laws, or by contract with depositors, the time and conditions on which repayment is to be made to depositors, except as in this act otherwise prohibited; but whenever there is any call by depositors for repayment of a greater amount than the bank may have disposable for that purpose, the directors or officers thereof must not make any new loans or investments of the funds of the depositors, or of earnings thereof, until such excess of call has ceased. The directors of any such bank, having no capital stock, must retain, on each dividend day, at least ten per centum of the net profits of the bank, to constitute a reserve fund, which must be invested in the

same manner as other funds of the bank, and must be used toward paying any losses which the bank may sustain in pursuing its lawful business. The bank may provide by its by-laws for the disposal of any excess in the reserve fund, as provided for in this act, and the final disposal, upon the dissolution of the bank, of the reserve fund, or of the remainder thereof, after payment of losses.

No director or officer of any savings bank must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such bank, nor must become an indorser or surety for loans to others, nor in any manner be obligor for moneys borrowed of or loaned by such bank. The office of any director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant, and every director or officer authorizing or consenting to such loan, and the person who receives such loan, shall severally be guilty of a misdemeanor.

Receiving deposits, issuing certificates of deposit, checks, and bills of exchange, and the like, in the transaction of the business of savings banks, must not be construed to be the creation of debt within the meaning of the phrase, "create debt," in section 309 of the Civil Code and as provided for in this act.

No savings bank shall loan money except on adequate security of real or personal property, and no such loan shall be made for a period longer than ten years; provided, that no loans shall be made on unsecured notes.

No savings bank shall invest or loan more than five per centum of its assets on any one bond issue, except bonds of the United States, of the State of California, of the counties, cities and counties, cities or school districts of this State.

No savings bank shall loan money to exceed ninety per centum of the market value of bonds specified in subdivisions (a), (b), (c) and (d), of subdivision three of section sixty-one of this act, and no more than eighty-five per centum of the market value of bonds specified in subdivision (e) of

subdivision three of section sixty-one of this act, and no more than seventy-five per centum of the market value of bonds specified in subdivisions (f) and (g) of subdivision three of section sixty-one of this act, and no more than sixty-five per centum of the market value of personal property and stocks of corporations or banks; provided, however, that no loan shall be made upon the capital stock of any corporation or bank unless such corporation or bank has been in existence for two or more years and has earned and paid a dividend on its capital stock.

No savings bank shall make any loan on the security of real estate except it be a first lien and in no event to exceed sixty per centum of the market value of any piece of real estate to be taken as security, except for the purpose of facilitating the sale of property owned by the savings bank; provided, that a second lien may be accepted to secure the repayment of a debt previously contracted in good faith.

No savings bank shall purchase, invest, or loan its capital or the money of its depositors, or any part of either, in mining shares or stock.

No savings bank shall hereafter make a loan secured by the stock of another bank, if by making such loan the total stock of such other bank held by such loaning bank as collateral will exceed in the aggregate ten per centum of the capital stock of such other bank.

Any president or managing officer who knowingly consents to a violation of the above provisions shall be deemed guilty of a felony.

Savings banks must carry in cash, or its equivalent, an amount equal to four per centum of its deposit liabilities, of which two per centum of such liabilities shall be in coin or currency of standard value in its own keeping. The amount thus carried shall be called the lawful money reserve.

No new loan shall be made during any deficiency in the lawful money reserve.

Deposits with commercial banks and trust companies, on open account, to facilitate business transactions, as provided in this section, shall be permitted, and shall not be construed as loans.

Not more than five per centum of the deposits of any savings bank shall be deposited with any one bank.

Every savings bank, and the business of every savings department of every other bank, must be conducted under and in accordance with the provisions of this act.

(q) — Commercial Banks. — No commercial bank shall make any loans to any person, company, corporation, or firm to an amount exceeding one-tenth part of the capital stock of such bank actually paid in and surplus; provided, however, that a bank may loan to any person, company, corporation or firm a sum not exceeding twenty-five per centum of its capital stock actually paid in and surplus upon security worth at least fifteen per centum more than the amount of its loans; or it may loan ten per centum of such capital and surplus as first above provided, and a further sum not exceeding fifteen per centum of such capital and surplus upon security worth at least fifteen per centum more than the amount of such loan so secured; except that a commercial bank may buy from, or discount for any person, company, corporation, or firm, or loan upon bills of lading, warehouse receipts and bills of exchange, drawn in good faith against actual existing value or against commercial or business paper actually owned by the person negotiating the same.

No loan shall be made by any commercial bank upon the securities of one or more corporations, the payment of which is undertaken, in whole or in part, severally, but not jointly, by two or more individuals, firms, or corporations:

If the borrowers or underwriters be obligated absolutely or contingently to purchase the securities, or any of them, collateral to such loan, unless the borrowers or underwriters shall have paid on account of the purchase of such securities an amount in cash, or its equivalent, equal to at least

twenty-five per centum of the several amounts for which they remain obligated in completing the purchase of such securities;

If the commercial bank making such loan be liable, directly or indirectly, or contingently, for the repayment of such loan or any part thereof;

If its term, including any renewal thereof by agreement, express or implied, exceed the period of one year;

Or to an amount under any circumstances in excess of twenty-five per centum of the capital and surplus of the commercial bank making such loan.

Every commercial bank which is now transacting, or which may hereafter transact business, shall have actually paid in a capital stock of not less than twenty-five thousand dollars; and until said sum of twenty-five thousand dollars shall be actually paid in, the superintendent of banks shall not issue the certificate required by section twenty-four of this act; provided, that nothing herein shall be construed to affect the provisions of section twenty-three of this act relative to the capital stock required of banks doing a departmental business.

No commercial bank shall loan any of its funds to any of its directors unless such loan shall first have been approved by a two-thirds vote of its board of directors, on which vote the borrowing director shall not participate, and the fact of making such loan, the name of the director borrowing the same, the time when the same shall become due, the rate of interest thereon, and the amount, value, and character of the security pledged therefor, if any, shall be forthwith forwarded by the cashier of such bank to the superintendent of banks; and if the superintendent of banks shall disapprove of such loan, he shall immediately notify such bank of his disapproval thereof, and such bank shall forthwith collect such loan; provided, however, that the total loans to all directors of such bank shall not at any one time exceed thirty per cent of the capital and surplus of such bank; and provided, further, that each bank having any loan or loans

outstanding to any of its directors shall once each month report in writing to the superintendent of banks the name of each director to whom such loan is made, the amount of such loan, the rate of interest thereon, the time when the same shall fall due, and the security pledged therefor, if any. Any officer or director of any commercial bank violating any of the provisions of this section shall be guilty of a felony.

(r)—Trust Companies.—Any corporation which has been or shall be incorporated under the general incorporation laws of this State, authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depositary or trustee, and having a capital of not less than two hundred thousand dollars actually paid in, in cash, may be appointed to act in such capacity in like manner as individuals and shall be known as a trust company. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depositary, or trustee, shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation if such oath shall be taken and subscribed or such affidavit made by the president or secretary or manager or trust officer thereof, and such officer shall be liable for the failure of such trust company to perform any of the duties required by law to be performed by individuals acting in like capacity and subject to like penalties; and such trust company shall be liable for such failure to the full amount of its capital stock; provided, any such appointment as guardian shall apply to the estate only, and not to the person. Such trust company shall be entitled to and shall be allowed proper compensation for all the services performed by them under the foregoing provisions of this act; but such compensation shall not exceed that allowed to natural persons for like services.

Any court, having appointed and having jurisdiction of any executor, administrator, guardian, assignee, receiver,

depositary, or trustee, upon the application of such officer or trustee, or upon the application of any person having an interest in the estate administered by such officer or trustee, after notice to the other parties in interest as the Court may direct, and after a hearing upon such application, may authorize such officer or trustee to deposit any moneys then in his hands, or which may come into his hands thereafter, and until the further order of said Court, with any such trust company; and upon deposit of such money, and its receipt and acceptance by such trust company, the said officer or trustee shall be discharged from further care or responsibility therefor. Such deposits shall be paid out only upon the orders of said Court.

It shall be lawful for any public administrator to deposit with any trust company having not less than two hundred thousand dollars paid-up capital, doing business in the county, or city and county, in which he is acting as such administrator, any and all moneys of any estate upon which he is administering, not required for the current expenses of the administration; provided, that such corporation deposit with the State Treasurer the securities required by this act. Such deposits shall relieve the public administrator from depositing with the County Treasurer the moneys so deposited with such corporation. Moneys so deposited by a public administrator may be drawn, upon the order of such administrator, countersigned by a judge of a Superior Court, when required for the purpose of administration, or otherwise.

Whenever, in the judgment of any Court having jurisdiction of any estate in process of administration by any executor, administrator, guardian, assignee, receiver, depositary, or trustee, and after such notice to the parties in interest as the Court shall direct, and after a hearing on such application, the said Court may order the said officer or trustee to deposit with any such trust company, for safe keeping, such portion or all of the personal assets of said estate as it shall deem proper; and thereupon said Court

shall, by an order of record, reduce the bond to be given or theretofore given by such officer or trustee, so as to cover only the estate remaining in the hands of said officer or trustee; and the property as deposited shall thereupon be held by such trust company, under the orders and directions of said Court. Any Court having jurisdiction of an estate being administered by a public administrator, may direct such public administrator to deposit all or any part of the moneys of the estate not required for the current expenses of the administration, with any such trust company doing business in the county, or city and county, where such public administrator is acting.

Such trust company shall not be required to give any bond or security in case of any appointment hereinbefore provided for, except as hereinafter provided, but shall be responsible for all investments which shall be made by it of the funds which may be entrusted to it for investment by such Court, and shall be liable as natural persons in like positions now are, and as hereinafter provided.

Such trust company shall pay interest upon all moneys held by it as trustee, by virtue of this act, at such rate as may be agreed upon at the time of its acceptance of any such appointment, or as shall be provided by the order of the Court.

Each trust company, before accepting any such appointment or deposit, shall deposit with the Treasurer of State, for the benefit of the creditors of said trust company, the sum of one hundred thousand dollars ($100,000), in bonds of the United States, or municipal bonds of this State, or of any county, or city, city and county, or school district thereof, or in mortgages on improved and productive real estate in this State, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon; said bonds or mortgages to be approved by the superintendent of banks. The bonds and securities so deposited may be exchanged from time to time for other securities, receivable as aforesaid. Said bonds of the United States, or

municipal bonds of this State, or of any county, city, city and county, or school district thereof, to be registered in the name of said Treasurer, officially, and all said securities to be subject to sale and transfer, and to the disposal of the proceeds by said Treasurer, only on the order of a court of competent jurisdiction and as hereinafter provided. The State shall be responsible for the safe return of such securities deposited with the Treasurer of the State under this section.

Any such trust company, having a paid-up capital in excess of two hundred thousand dollars, may be permitted by the superintendent of banks to mortgage any improved and productive real estate owned by it, in excess of said amount, to the Treasurer of State, for such sum as the said superintendent of banks may determine, and such mortgage may be deposited with said Treasurer, and when so deposited it shall be included in the amount of securities hereinabove required to be deposited with said Treasurer for the benefit of the creditors of said trust company.

So long as the trust company so depositing shall continue solvent, it shall be permitted to receive from said Treasurer the interest or dividends on said deposits, and whenever any trust company receives trust funds as such trustee in excess of five hundred thousand dollars, it shall deposit with the State Treasurer securities mentioned in section 96 of this act, to be approved by the superintendent of banks, in the amount of another one hundred thousand dollars, and for each five hundred thousand dollars of such trust funds thereafter received, an additional deposit of fifty thousand dollars of such securities likewise approved shall be made with the said State Treasurer; provided, however, that no trust company shall be required to deposit more than one million dollars of such securities.

The State shall be responsible for the safe return of such securities deposited with the Treasurer of the State under this section.

When any part of such deposit with the State Treasurer is made in bonds and mortgages, it shall be accompanied by full abstracts of titles and searches, or by certificates of title issued by a person, company or corporation, whose business or objects are to make searches of titles and issue certificates of titles, and which said person, company or corporation shall be one designated or approved by said superintendent of banks, and shall be examined and approved by or under the direction of the said superintendent of banks. The fees for an examination of title by counsel to be paid by the trust company making the deposit, shall not exceed twenty dollars for each mortgage, and the fee for each appraiser, not exceeding two, besides expenses, shall be five dollars for each mortgage.

Before the superintendent of banks issues his certificate to any trust company, there must be filed in his office the affidavit of a majority of its board of directors or the persons named in said articles as the first directors of the corporation that at least two hundred thousand dollars of the capital stock has actually been subscribed and paid in to a person named in such affidavit for the benefit of the corporation.

On making the report required by the terms of this act, every trust company shall, in addition to the other facts to be reported on, furnish a list and brief description of the trusts held by such corporation, the source of the appointment thereto, and the amount of real and personal estate held by such trust company by virtue thereof; except that mere mortgage trusts, wherein no action has been taken by such corporation, shall not be included in such statement.

Any trust company which desires to retire from business under this act, shall furnish to the superintendent of banks satisfactory evidence of its release and discharge from all the obligations and trusts hereinbefore provided for; whereupon he shall revoke his certificate to such trust company, and thereupon the Treasurer of State shall return to said trust company all its securities.

Except as herein otherwise provided, any trust company exercising the powers and performing the duties provided for in this act, shall keep inviolate all communications confidentially made to it touching the existence, condition, management and administration of any trusts confided to it; and no creditor or stockholder of any such trust company shall be entitled to disclosure of any such communication; provided, however, that the president, manager and secretary of such trust company shall be entitled to knowledge of such communication; and provided, further, that in any suit or proceeding touching the existence, condition, management or administration of such trust, the Court wherein the same is pending may require disclosure of any such communication.

The use of the word "trust" in combination with or in connection with the word "company," "corporation," "incorporation," "association," "society," "organization," or "syndicate," is hereby prohibited to all persons, firms, associations, companies or corporations other than corporations provided for by this act. Every person, firm, association, company or corporation which uses the word "trust" in combination with or in connection with the word "company," "corporation," "incorporation," "association," "society," "organization," or "syndicate," as the name under which business is done or transacted, shall be subject to the provisions of this act and to the supervision of the superintendent of banks. Any person, firm, association, company, or corporation making use of the word "trust" in combination or in connection with the word "company," "corporation," "incorporation," "association," "society," "organization," or "syndicate," in the manner hereinabove mentioned, in the transaction of business, and not subject to the provisions of this act and the supervision of the superintendent of banks, shall be guilty of a misdemeanor.

No corporation hereafter formed shall use the word "trust" or "trustee" as a part of its corporate name unless it shall be authorized by its articles of incorporation to act as

executor, administrator, guardian, assignee, receiver, depositary or trustee; nor shall any corporation hereafter formed accept or execute any trust mentioned in this act, unless it shall have complied with the provisions of this act.

Every trust company shall invest its capital and trust funds received by it in accordance with the laws relative to the investment of funds deposited with savings banks, unless a specific agreement to the contrary is made between the trust company and the party creating the trust.

Every trust company desiring to do or doing a commercial banking business or a savings bank business, or both, in addition to its trust business, shall have paid up in cash the capital as provided in section twenty-three of this act. Such capital for each such department shall be increased from time to time in the same manner and to the same extent as though such bank were conducting separate banks instead of separate departments.

Every trust company doing a departmental business shall comply with the provisions of this act governing each of such departments as to its deposits, reserves, investments, and loans.

(s)—State Banking Department.—A State banking department has been created by the new law. A superintendent of banks is appointed by the Governor, at a salary of $10,000 per year. He will have offices at San Francisco and Los Angeles. All banks are subject to his inspection. No bank shall transact any business in this State without the written approval of the superintendent of banks.

Whenever the superintendent of banks shall have reason to believe that the capital of any bank is reduced by impairment or otherwise below the amount required by law or by its articles of incorporation, he may require such bank to make good the deficiency within sixty days after the date of such requisition. He may examine or cause to be examined any such bank to ascertain the amount of such

impairment or reduction of capital and whether the deficiency has been made good as required by him.

If it shall appear to the superintendent of banks that any bank has violated its articles of incorporation, or any law binding upon it, he must, by an order under his hand and official seal, which seal must be adopted by him, addressed to such bank, direct the discontinuance of such violation; or, if it shall appear to the superintendent of banks that such bank is conducting business in an unsafe or injurious manner, he must in like manner direct the discontinuance of such unsafe or injurious practices. Such order shall require such bank to show cause, before the superintendent of banks, at a time and place to be fixed by him, why said order should not be observed. If upon such hearing it shall appear to the superintendent of banks that such bank is conducting business in an unsafe or injurious manner, or is violating its articles of incorporation, or any law of this State, then the superintendent of banks shall make such order of discontinuance final, and such bank shall immediately discontinue all practices named in such order by the superintendent of banks. Such bank shall have ten days after any such order is made final in which suit may be commenced to restrain enforcement of such order, and unless such action be so commenced and enforcement of said order be enjoined within ten days, by the court in which such suit is brought, then such bank shall comply with such order; and, in the event of its failure so to do, then the superintendent of banks shall have power to take immediate charge and control of said bank, and liquidate its affairs in the manner provided in this act for the liquidation of banks.

Whenever the superintendent of banks shall have reason to conclude that any bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue business, the superintendent of banks may forthwith take possession of the property and business of such bank, and retain such possession until such bank shall resume business, or its affairs be finally liquidated.

On taking possession of the property and business of any such bank, the superintendent of banks shall forthwith give notice in writing of such fact to any and all corporations and individuals holding or in possession of any of the assets of such bank.

No bank, corporation, or individual, knowing of such taking possession by the superintendent of banks, or notified as aforesaid, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the superintendent of banks shall have taken possession as aforesaid. Such bank may, with the consent of the superintendent of banks, resume business upon such conditions as may be approved by him.

Upon taking possession of the property and business of such bank, the superintendent of banks is authorized to collect moneys due to such bank, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided.

The superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the Superior Court may sell or compound all bad or doubtful debts, and on like order may sell all real and personal property of such bank on such terms as the Court shall direct; and may, if necessary to pay the debts of such bank, enforce individual liability of the stockholders by action to be brought within three years after the date of his taking possession of the affairs of such bank.

It shall be the duty of the board of directors of every bank to examine fully into the books, papers, and affairs of the bank of which they are directors, and particularly into the loans and discounts thereof, with a special view to ascertaining the value and security thereof, and of the collateral security, if any given, in connection therewith, and into such other matters as the superintendent of banks may require; such examination to be made at least once a year, but no

such subsequent yearly examinations shall be made within three months of the next preceding examination. Such directors shall have power to employ such assistance in making such examination as they may deem necessary. Within ten days after the completion of such examination, a report in writing thereof, sworn to by the directors making the same, shall be made by the board of directors of such bank, and placed on file with the records of said bank, and shall be subject to examination by the superintendent of banks.

Such report shall particularly contain a statement of the assets and liabilities of the bank examined, as shown by its books, together with any deductions from the assets, or additions to liabilities, which such directors or committee, after such examination, may determine to make. It shall also contain a statement, in detail, of loans, if any, which in their opinion are worthless or doubtful, together with their reasons for so regarding them; also a statement of loans made on collateral security, which in their opinion are insufficiently secured, giving in each case the amount of the loan, the name and market value of the collateral, if it has any market value, and, if not, a statement of that fact, and its actual value as nearly as possible. Such report shall also contain a statement of overdrafts, of the names and amounts of such as they consider worthless or doubtful, and a full statement of such other matters as affect the solvency and soundness of the bank. If the directors of such bank shall fail to make, or cause to be made, and file such report of examination in the manner and within the time specified, the directors of such bank shall be guilty of a misdemeanor.

Act of the Legislature, approved March 1, 1909.

(t)—**Lien of Bank.**—A bank has a general lien, dependent on possession, upon all property in its hands belonging to a customer, for the balance due the bank from such customer in the course of their business together.

Civil Code, Section 3053.

(u)—National Bank Cannot Deal in Stocks.—A national bank has no power to deal in stocks of another corporation; and it cannot purchase or subscribe for the stock of another corporation. As incidental to the power to loan money on personal security, however, a national bank may, in the usual course of doing such business, accept stock of another corporation as collateral; and by the enforcement of its rights as pledgee it may become the owner of the collateral; but it cannot, in the ordinary course of business, buy or sell stocks of another corporation. (Decided by the Supreme Court in the case of Chemical National Bank vs. Havermale, which decision is printed in Volume 120 of the California Reports, page 53.)

(v)—Deposit of State Money.—The State Treasurer may deposit the money of the State in banks, State or national, in California, for safe keeping. Such banks must be selected from those agreeing to pay the highest rate of interest, which cannot be less than two per cent per annum. Bids will be called for by the State Treasurer. He cannot deposit in any bank more in amount than 25 per cent of its paid-up capital stock. Deposits are to be subject to withdrawal at any time. A bank receiving a deposit must leave with the State Treasurer, United States, State, County, Municipal, or School District bonds, in value more than ten per cent greater than the amount of money deposited with it. Each bank in which State money is deposited must at the end of each month render to the State Treasurer a statement in duplicate showing the daily balances of the account with the State during the month and the amount of the accrued interest thereon. The Treasurer, with the approval of the Governor, may require a depository bank to furnish an indemnity bond, in addition to the bonds given as security.

Act of the Legislature, approved February 28, 1907.

(w)—Deposit of County or City Money.—County or municipal moneys may be deposited in banks by the public

officer having the legal custody of such funds. When such funds are so deposited, the bank must furnish as security bonds of the United States, or bonds of California, or bonds of any county, municipality, or school district within this State, which must be approved by the officer making the deposit and the District Attorney of a county or City Attorney of a city. The market value of the bonds furnished as security must be at least ten per cent in excess of the amount of the deposit; provided, the amount of the deposit cannot in any case exceed the face value of the bonds. The bank receiving such deposit must pay a reasonable amount of interest, which must not be less than two per cent per annum on the daily balances deposited. The rate of interest must be fixed annually in the month of January, in the case of counties by the Treasurer, Auditor and Chairman of the Board of Supervisors, or in the case of cities by the Treasurer, Auditor (or Clerk in cities having no Auditor), and Chairman of the Council or other governing body of the municipality. Interest on deposits must be paid quarterly. Deposits are subject to withdrawal at any time on demand. The bank may also return deposits at any time. The total amount deposited in any bank cannot at any one time exceed fifty per cent of its capital stock. No officer can have on deposit at any one time more than ten per cent of the public moneys under his control, and available for deposit in any bank, while there are other qualified banks requesting deposits. Money must be deposited in banks within the county or city, and no officer can be required to deposit money in outside banks.

Act of the Legislature, approved March 23, 1907.

Section 1000. — Section 1000, "Insurance Companies," is omitted from the Eighth Edition.

Section 1000a.—FOREIGN CORPORATIONS.—Every foreign corporation organized under the laws of another State, Territory, or foreign country, doing business in this

State, or maintaining an office here, must file in the office of the Secretary of State a certified copy of its articles of incorporation or charter; and a copy thereof, certified by the Secretary of State of California, must be filed in the office of the county clerk of the county where such corporation has its principal place of business, and must also be filed in the office of the county clerk of any county where the corporation owns property.

Every foreign corporation must, at the time of filing the certified copy of its articles of incorporation, file in the office of the Secretary of State a designation of some person residing within the State upon whom summons or other legal process may be served.

Act of the Legislature, in effect May 18, 1907.

Section 1001.—Section 1001, "Railroad Corporations," is omitted from the Eighth Edition.

PART VII

MINES AND MINING

Section 1002.—UNITED STATES LAWS.—The laws of the United States govern the subject of mines and mining, and provide the manner in which locations shall be made, how a mining claim can be held, and the particular lands upon which a mining location may be placed. The laws of the United States also direct and control the rights and liabilities of miners in relation to each other. The laws of the United States are paramount on all these matters.

Section 1003.—STATE LAWS.—While, as has been said, the laws of the United States are paramount, yet the State of California has power, through its Legislature, to pass mining laws, providing for the health and safety of those engaged in mining, or employed in and about mining works; and to pass mining laws regulating locations, and other matters, provided such laws are not in conflict with the laws of the United States.

Section 1004.—LOCAL RULES AND CUSTOMS.—The miners of any mining district in the State may adopt local rules and establish local customs in relation to the acquisition, holding, and working of claims within such district; and such rules and customs, when proved, have the force of law, provided they do not conflict with the laws of the United States or of the State of California. These local rules and customs usually deal with the posting and recording of location notices, and sometimes regulate the size of a claim, and the number of claims which any person may locate, in the district; and while they cannot extend or enlarge the rights conferred by the laws of the United

States or of the State, they can and frequently do restrict them.

Section 1005.—WHO MAY LOCATE A MINING CLAIM.—Only those who are citizens of the United States, or who have declared their intention to become such, are allowed by the law to make a location of mineral lands in California.

Revised Statutes of the United States, Section 2319.
Act of the Legislature, approved March 13, 1909.

Section 1006.—UPON WHAT LAND MINING CLAIM MAY BE LOCATED.—Only unoccupied, unclaimed public mineral lands are locatable as a mining claim. The land must be public land, that is, it must be land the title to which is in the United States, and which is open to entry. Therefore, if it is land which has been expressly reserved by law, or if it is occupied as an Indian Reservation, it is not open to entry as mineral land. It must be unoccupied and unclaimed; that is, it cannot be located upon if there is already a claimant in good faith occupying the land. But this does not mean every occupancy of any character, a mere possession without right. The occupation and claim to the land, in order to be a bar to location by another, must be in good faith and in compliance with the law of the United States. And, lastly, it must be mineral land. The test of the character of the land is, whether it is more valuable for minerals than for agricultural purposes. If the land contains mineral in its natural state, it is mineral land, and may be located upon as a mining claim.

Section 1006a.—VALUABLE MINERAL DEPOSIT.—In order to constitute a valuable mineral deposit within the meaning of the federal laws, there must be minerals in such quantity as to justify the expenditure of effort to extract them. It is not necessary, however, that mineral of sufficient amount and value to allow immediate profitable working be

shown to exist in the land, a present or prospective commercial value being enough. (Decided by the Supreme Court of California, in the case of Madison vs. Octave Oil Company, which decision is printed in Volume 37, California Decisions, page 29.)

Section 1007.—WHAT IS MINING.—Mining is defined to be digging and searching for precious and economic metals and minerals, whether by shafts, pits, and tunnels, or by placer or hydraulic gravel mining; and the term includes the mining of coal, iron, phosphate, and hydrocarbons, and the boring for oil and gas, as well as prospecting for any of those metals or minerals.

Section 1008.—WHAT CONSTITUTES A VALID LOCATION.—To constitute a valid location of a mining claim, three things are always essential. There must be, first, discovery of the mineral; second, posting and recording of notice; third, marking the location on the ground so that the boundaries can be readily traced.

Section 1009.—THE DISCOVERY.—If it is a lode claim, there must be an actual discovery of mineral. If a person should attempt to take a lode claim on land which he had not prospected, and knew nothing about, it would not be a valid location. Good faith is required by the law. And no location of a claim can be made until the discovery of the vein or lode within the limits of the claim located. To discover a quartz claim, means the actual finding of mineral-bearing rock in place, the discovery of mineral-bearing ore within the crevices of the rock, or incased within defined boundaries; or, the discovery of such indications of the presence of ore within rock in place, as an experienced miner would feel justified in spending his time and money upon with the reasonable expectation of finding ore in paying quantities. When a locator finds rock in place containing mineral, he has made a discovery within the

meaning of the law, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth to discover and develop a mineral-bearing vein, lode, or crevice. He should also determine, if possible, the general course of the vein in either direction from the point of discovery, by which direction he will be governed in making the boundaries of his claim on the surface. What has been said on the subject of discovery applies only to lode or quartz claims. The law does not specify any actual discovery of mineral as an essential to the location of a placer claim, and it has been held in California that a location of a placer claim may be made without discovery of minerals being first made on the ground. But no patent could be obtained for a placer claim without proof of the mineral character of the claim.

Section 1010.—MARKING THE BOUNDARIES.—The boundaries must be marked in such a way that the claim can be identified on the ground. The locator should drive a post or erect a monument of stones at each corner of his surface ground; and at the point of discovery, or discovery shaft, he should fix a post, stake, or board, on which should be designated the name of the lode, the name or names of the locators, and the number of feet claimed and in which direction from the point of discovery.

Section 1011.—LOCATION NOTICE.—A notice of location must be posted on the claim, at the point of discovery, or discovery shaft.

Section 1012.—FORM OF NOTICE OF LOCATION OF LODE CLAIM.—The following is a form of location of lode claim:—

Location Notice.

NOTICE IS HEREBY GIVEN TO ALL WHOM IT MAY CONCERN: That ....., a citizen of the United States, having discovered a lode or vein of quartz, or rock in place, bearing ..... (here insert kind of mineral discovered), within the limits of the claim hereby located, has this day, under and in accordance with the Revised Statutes of the United States, Chapter VII, Title 32, located ..... (here state number of feet) linear feet of this vein or lode, with surface ground ..... (here state number of feet) feet in width, situated in ..... mining district, County of ....., State of California, and known as ..... (here state name of mine), extending ..... feet to a ..... (here describe natural object or monument), and ..... feet ..... to ..... (here describe natural object or monument) from this notice at the discovery or prospect shaft, the exterior boundaries of this claim being distinctly marked by reference to some natural object or permanent monument, and more particularly described as follows, to-wit: ....

(Here insert description.)

....

....,

and I intend to hold and work said claim as provided by the local customs and local rules of miners, and the mining Statutes of the United States.

.....

Dated on the ground, the ..... day of ....., 19...

Discovered ....., 19...

....., locator.

Recorded ....., 19...

Section 1013.—FORM OF NOTICE OF LOCATION OF A PLACER CLAIM.—The following is a form of notice of location of a placer claim:—

Location Notice.

NOTICE IS HEREBY GIVEN TO ALL WHOM IT MAY CONCERN: That ....., a citizen of the United States, has this day located, in accordance

with the Revised Statutes of the United States, Chapter VI, Title 32, the following described placer mining ground, to-wit: .....
.....
(Description: If on surveyed land, describe the legal sub-
.....
division. If on unsurveyed land, describe as accurately as
.....
possible by courses and distances.)
.....
.....
Situated in ..... mining district, County of ....., State of California. This claim shall be known as ..... (here insert name of claim) mining claim, and I intend to work the same in accordance with the local customs and rules of miners, and the mining Statutes of the United States.

.....
Dated on the ground the ..... day of ....., 19...
Located ....., 19...
Recorded ....., 19...

Section 1014.—RECORDING LOCATION NOTICE.—The Congress of the United States has provided by law that "the location notice must be filed for record in all respects as required by the State laws and local rules and regulations, if there be any." The State of California, by an Act of the Legislature, has provided that notices of location of mining claims must be recorded in the Recorder's office of the county where the mining claim is situated, within thirty days after the posting of notice of location. This applies to lode, placer, and tunnel claims.

Civil Code of California, Section 1159.
Act of the Legislature, approved March 13, 1909.

Section 1015.—SIZE OF LODE CLAIM.—Any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of fifteen hundred linear feet along the course of any mineral vein or lode subject to location; or

an association of persons, who are citizens of the United States, may make a joint location of fifteen hundred feet along the course of the lode or vein. The claim, according to the law, is not to exceed fifteen hundred feet in length. As to width, the law provides that the lateral extent of locations on veins or lodes shall in no case exceed three hundred feet on each side of the middle of the vein at the surface. Thus the extreme size of a lode claim is fifteen hundred feet in length by six hundred feet in width. But the law also gives mining districts the right to reduce the width of a mining claim to less than six hundred feet, but not less than fifty feet. The laws referred to are the laws of the United States. The State of California has no law of its own upon the subject. When the locator does not determine by survey or exploration where the middle of his vein at the surface is, his discovery shaft is taken to mark the middle of the vein.

Where the vein runs in one direction, the location must follow the direction of the vein, and the locator cannot stake his claim crosswise of the vein and expect to hold the full amount allowed by law as the size of a lode claim. Where the vein within a mining claim ran in a northerly and southerly direction, and the location was crosswise of the vein, it was held by the Court of Appeals that the side-lines were really end-lines, considering the direction of the lode on the surface; and that the rights of the locators must be confined to the area within the side-lines three hundred feet on each side of the vein or lode. (Decided by the California Court of Appeals, in the case of Southern California Ry. Co. vs. O'Donnell, which decision is printed in Volume 85 of the Pacific Reporter (advance sheets), page 932.)

Revised Statutes of the United States, Section 2320.

Section 1016.—SIZE OF PLACER CLAIM.—An individual may locate twenty acres as a placer claim. Two persons may associate themselves together and locate forty acres as a placer claim; and so on up to eight persons, who

may locate one hundred and sixty acres as a placer claim. But no individual can locate more than twenty acres, and no association of persons can locate more than one hundred and sixty acres.

Revised Statutes of the United States, Sections 2330, 2331.

Section 1017.—DISCOVERY ON PLACER GROUND.—It has already been stated that there must be a valid discovery of minerals, before the location can have any legal effect, and that the discovery of a quartz claim must be of a lode or vein in rock in place. But when we come to consider a placer claim, the rule stated does not apply. The term "placer" is of wide significance. It includes any form of mineral deposit, except quartz or other rock in place. All forms of mineral and metal bearing earth, other than veins or lodes in rock in place, are held to be "placer." They cannot be fixed in place, confined within walls of rock, for they may be found in shifting sand, or loose gravel, or in the channels of rivers; and the term "placer" includes natural gas, petroleum, and hydrocarbons. But while a valid location may be made under the laws relating to placer locations without a previous discovery of mineral, yet such discovery must be made before a patent from the United States Government can be issued under the Acts of Congress relating to the disposition of mineral lands. (Decided by the Supreme Court of California in the case of Gregory vs. Pershbaker, which decision is printed in Volume 73 of the California Reports, page 109.)

(a)—Discovery of Oil.—A discovery of oil within the limits of the claim is essential to the validity of an oil location. To constitute a discovery of oil, there must be something more than ordinary surface indications, such as the seepage of oil, or geological formations. There must be an actual discovery of oil in paying quantities. It is not necessary that this discovery be made before or at the time of the

location, for a subsequent discovery will operate to perfect the location. But if the location is made before discovery of oil in paying quantities, and the locator leaves the claim, without prosecuting work on it, another person may lawfully enter and locate on the land. (Decided by the Supreme Court of California, in the case of New England and Coalinga Oil Co. vs. Congdon, which decision is printed in Volume 34 of California Decisions, page 395.)

Section 1018.—TIME WITHIN WHICH LOCATION MUST BE MADE AFTER DISCOVERY.—The law of the United States does not specify any certain time within which location must be made, and notices posted or recorded, after discovery. The location must be made, and the boundaries marked on the ground, within a reasonable time after discovery. If local rules and customs prescribe a certain time, that time must be followed. Whenever any patent to mineral lands shall contain a statement of the date of location of a claim or claims, upon which such patent is based, this statement will be received in the courts of California as prima facie evidence of the true date of the location. (Act of the Legislature, approved March 7, 1905.)

Section 1019.—OIL AND ASPHALTUM.—Petroleum, natural gas, and asphaltum are held to be mineral, and may be located as placer claims. Much controversy over the question, whether public land in which petroleum was found could be located under the mining laws, caused the Congress of the United States to pass an act on the subject in 1897, which removes all doubt. The law reads: "Any person authorized to enter lands under the mining laws of the United States may enter or obtain patent to lands containing petroleum or other mineral oil, and chiefly valuable therefor, under the provisions of the laws relating to placer and mineral claims." Therefore, twenty acres of oil lands may be located as a placer claim by an individual, and as much as one hundred and sixty acres by an association of

persons. It is not necessary that discovery of oil should be first made.

Act of Congress, approved February 11, 1897.

(a)—Transfer of Rights by Members of Association.—The rights acquired by an association of locators of mineral lands may be transferred among themselves before discovery, without affecting the whole claim, and the subsequent discovery by any grantee will perfect the entire original location.

Where an association of eight persons locate one hundred and sixty acres of mineral land for the purpose of discovering oil, and before discovery transfer a specific portion to a stranger, such portion becomes a separate and independent claim, unless there be an agreement to the contrary; and a subsequent discovery of oil on such severed portion will not perfect the entire original location. (Decided by the Supreme Court of California, in the case of Merced Oil Mining Company vs. R. L. Patterson, which decision is printed in California Decisions, Volume 35, page 550.)

Section 1020.—ANNUAL LABOR AND ASSESSMENT WORK.—In order to hold a mining claim, the locator must do a certain amount of work each year, and this is measured not by time, but by the value of the work performed. On each claim located, whether quartz or placer, not less than one hundred dollars' worth of labor must be done, or an equal value of improvements made, during each year until a patent has been issued for the claim. A failure to comply with this law forfeits the claim, and leaves it open for relocation by another person. But if the original locator, his heirs, assigns, or legal representatives, after the time has expired within which he should have done the assessment work, and before another person has located on the ground, then proceeds to do the work, he saves the forfeiture and recovers the claim again to himself.

Revised Statutes of the United States, Section 2324.

Section 1021.—WHEN FIRST WORK MUST BE DONE.—The law does not mean that the work should be done within a year from the date of location. The period for performing the assessment work commences on the first day of January succeeding the date of location of the claim. At least one hundred dollars' worth of work must be done each year.

Supplement to the Revised Statutes of the United States, Volume 1, page 276.

Section 1022.—WHERE WORK SHOULD BE DONE.—Annual labor or improvements to the amount of one hundred dollars may be anywhere within the boundaries of the claim. But it is not absolutely necessary that this work be done within such boundaries. It may be done on adjoining or neighboring ground, if the work so done tends to develop the claim, and this will be a sufficient compliance with the law.

And in a case where a miner holds several claims, the annual labor or improvements required for the whole of them may be done or made upon any one or more of them, provided that such labor or improvements tend to develop them all. And even if the claim upon which the work is done is patented, and the remainder are unpatented, it will make no difference, so long as the work done tends in fact to develop, and is done for the purpose of developing, the unpatented claims, and as assessment work upon them.

Work done or improvements made, for the purpose of developing the ground embraced in the location, outside of the limits of the claim, is as available for holding it as if done within its boundaries. Labor and improvements, within the meaning of the law, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, to facilitate the extraction of the metals it may contain; and such labor and improvements may lawfully be on ground which originally

constituted only one of the locations, as in sinking a shaft; or the labor and improvements may be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or to bring water on the claim, or where the improvement consists in the construction of a flume to carry off the debris or waste material. (Decided by the Supreme Court of California in the case of De Noon vs. Morrison, which decision is printed in Volume 83 of the California Reports, page 163.)

Section 1023.—PROOF OF ASSESSMENT WORK.—The law of California provides that proof of assessment work must be made by affidavit, within thirty days after the time limited for performing the labor or making the improvements, particularly describing the labor performed and improvements made, and the value thereof. The law also provides that this affidavit must be recorded in the office of the County Recorder of the county in which the mine or claim is situated, within thirty days.

Statutes of 1891, page 219.
Act of the Legislature, approved March 13, 1909.

Section 1024.—FORM OF PROOF OF ASSESSMENT WORK.—The following is a form of proof of assessment work:—

Proof of Labor.

STATE OF CALIFORNIA, }
County of ..... } ss.

Before me the subscriber personally appeared ...., who being duly sworn says, that at least $100 worth of labor or improvements were performed or made upon ..... (here state name of mining claim), situated in ..... mining district, County of ....., State of California, during the year ending December 31, 19... Such expenditure was made by or at the expense of .....

....., owner of said claim, for the purpose of holding said claim.

That the labor performed and improvements made were as follows, to-wit: .....

....

(Here give a particular description of the labor performed

....

and improvements made.)

....

That the value of said labor was $.....

That the value of said improvements was $.....

.....

Subscribed and sworn to before me this ..... day of ....., 19...

.....,

Notary Public in and for the County of .....

State of California.

(Note.—The above affidavit may be sworn to before a Notary, a Justice of the Peace, or any officer authorized by law to administer oaths.)

Section 1025.—RELOCATION OF CLAIM AFTER FORFEITURE.—If for any reason a mining claim has been forfeited, by failure to do assessment work, or by reason of abandonment, another person may relocate it. He must make his location as the original locator did, and in his notice of location he should state that the claim was originally located by another person (naming him), but that the claim had been abandoned or forfeited.

Section 1026.—MINERAL ENTRIES WITHIN FOREST RESERVES.—The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

Section 1027.—LOCATION BY AGENTS.—A location of a mining claim may be made in the name of another than the actual locator, and when so made, the person in whose name it is made becomes vested with the legal title to the claim. A prospector may locate for himself, and then make other locations in the names of others, and he will be considered the agent of the persons in whose names the locations are made. (Decided by the Supreme Court of California in the case of Moore vs. Hamerslag, which decision is printed in Volume 109 of the California Reports, page 122.)

Section 1028.—LOCATION BY MINORS.—A valid location of a mining claim may be made by a minor. The law allows any one who is a citizen, or who has declared his intention to become such, to locate a mining claim. The law does not require that the locator shall be of any particular age. In a California case the Supreme Court held that a minor can make a location of a mining claim in this State, saying: "Nor is there any reason in the nature of things why a minor may not make a valid location. After the preliminary steps are taken, all that is required is that a certain amount of work shall be done. If the minor cannot do it, he can get any one to do it for him, and the condition imposed by the statute is fulfilled. If he cannot, the claim lapses, and is open to relocation by others. It may be added that so far as we know it is the practice of many mining communities for minors to locate claims." (Decided by the Supreme Court of California in the case of Thompson vs. Spray, which decision is printed in Volume 72 of the California Reports, page 528.)

Section 1029.—TUNNEL CLAIMS.—The laws of the United States provide for certain tunnel claims, where a tunnel is run for the discovery of "blind lodes or veins;" and so long as the tunnel claimant operates his tunnel, the law reserves in his favor 3,000 feet from the face of the

tunnel, with 1,500 feet in the opposite direction on the strike of the vein, from either wall of his tunnel. The law states that the owner of the tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in the tunnel, to the same extent as if discovered upon the surface. Locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while it is being prosecuted with reasonable diligence, are invalid. Failure to prosecute the work on the tunnel for six months is considered as an abandonment of the right to all veins on the line not discovered when the work ceased.

Revised Statutes of the United States, Section 2323.

Section 1030.—LOCATION OF TUNNEL CLAIM.—The term "face," as used in the tunnel claim law, means the first working face formed in the tunnel, and signifies the point at which the tunnel actually enters cover, it being from this point that the 3,000 feet are to be counted upon which prospecting is prohibited. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent, well-known objects in the vicinity; and at the time of posting such notice they should, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at intervals of not more than 600 feet, to

the terminus of the 3,000 feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence. A copy of the posted notice must be filed with the County Recorder, and should also be filed with the Recorder of the mining district, if any; with an affidavit attached of the owners, claimants, or projectors of the tunnel, stating the amount expended by themselves and their predecessors in interest in prosecuting the work; the extent of the work performed; and that it is their intention in good faith to prosecute the work on the tunnel with reasonable diligence for the development of a vein or lode, or for the discovery of mines.

Section 1031.—LODE AND PLACER CLAIMS IN THE SAME GROUND.—It sometimes occurs that a lode will be discovered within the boundaries of a placer claim. In that event, the owners of the placer claim have an immediate right to apply to the Government for a patent, and the application must state the existence of the lode. The Government will then issue a patent for the lode, fifty feet in width, upon the payment of $5.00 per acre; and also a patent for the placer portion of the land upon the payment of $2.50 per acre. If the owner of a placer claim makes application for a patent, without mentioning a known vein or lode within its boundaries, any other person may locate the lode, in the same manner as any other quartz claim is located, but acquiring only 1,500 by 50 feet.

Revised Statutes of the United States, Section 2333.

Section 1032.—MILL SITES.—The owner of a lode claim may also locate, in the same manner as mining claims are located (that is, by posting and recording notice, and erecting monuments for identification), five acres of

non-mineral land for a mill site. The mill site need not be adjacent to the mining claim. It must be used for a mill site in connection with the mining claim, where a mill site is located by the owner of a lode claim. But the law further provides that the owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also locate a mill site, not exceeding five acres of non-mineral land, and obtain a patent for it.

Revised Statutes of the United States, Section 2337.

Section 1033.—TIMBER FOR MINING PURPOSES.—The law allows sufficient timber to be cut on mineral land for the proper working of the mine proper. Timber for the mine, shafts, or tunnels, for houses for employees, and other purposes in the working of the mine, may lawfully be cut and used.

Section 1034.—WATER AND WATER RIGHTS FOR MINING PURPOSES.—For the law as to water and water rights for mining purposes, see Part VIII, title, "Water and Water Rights."

Section 1035.—MINING PARTNERSHIPS.—For the law as to mining partnerships, see under the heading "Partnership."

Section 1036.—LIENS ON MINING CLAIMS.—For the law as to liens on mining claims, see under the heading, "Mechanics' Liens."

Section 1037.—ENTRY OF COAL LANDS.—Coal lands may be entered without making the location required for other claims. There is a difference, also, in the persons qualified to take coal lands, and in the number of acres which can be taken. The person who takes coal land must not only be a citizen of the United States, or have declared his intention to become such, but he must also be over the age of 21 years. Within sixty days after the date of actual possession and the commencement of improvements

on the land, an individual may enter at the Land Office in the district any quantity of vacant coal lands not exceeding 160 acres. An association of persons may enter not exceeding 320 acres. The price to be paid for coal lands is $20 per acre, for lands within fifteen miles of a completed railroad, or $10 per acre for lands more than fifteen miles from a completed railroad.

Revised Statutes of the United States, Section 2348.

Section 1038.—HOW TO OBTAIN A PATENT TO A MINING CLAIM.—The Revised Statutes of the United States, Section 2335, provide the manner in which a patent to a mining claim may be obtained. It will be seen from what follows that the claim-owner who desires a patent must go to a lawyer, to have his application made out, and the various plats and notices properly filed and published; and as he cannot safely use any of the necessary forms himself, without the aid of a competent lawyer, the forms are not given in this book. The claimant who wants a patent is required, in the first place, to have a correct survey of his claim made, under authority of the United States Surveyor-General for California; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Section 2335 of the United States Revised Statutes is as follows: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by

monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within sixty days of publication, shall file with the register a certificate of the United States Surveyor-General that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists."

Revised Statutes of the United States, Section 2335.

Section 1039.—MINING LEASE.—A mining lease is necessarily different in many respects from the ordinary lease, for it must provide for amount and character of

work to be done, timbering, the use of machinery, inspection of work and mine, the payment of royalty, and possibly other matters, which never enter into leases of other property.

A mining lease must be in writing, if the term is for more than one year.

Section 1040.—FORM OF MINING LEASE.—The following is a form of mining lease:—

THIS INDENTURE, made this ..... day of ....., in the year of our Lord one thousand nine hundred and ....., between ...., lessor, and ....., lessee or tenant, Witnesseth, That the said lessor for and in consideration of the rents, royalties, covenants, and agreements hereinafter reserved, and by the said lessee to be paid, kept, and performed, has granted, remised, and let, and by these presents does grant, remise, and let unto the said lessee, all the following described mine and mining property, situated in ..... mining district, County of ....., State of California, to-wit: ....

(Description of property.)

....

Together with the appurtenances ....., to have and to hold unto the said lessee or tenant for the term of ..... years from the date hereof, expiring at noon on the ..... day of ....., A. D. ....., unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant ..... reserved.

And in consideration of the said demise, the said lessee does covenant and agree with said lessor as follows, to-wit:—

To enter upon said mine or premises and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the safety, development, and preservation of the said premises as a workable mine.

To work and mine said premises as aforesaid steadily and continuously from the date of this lease; and that any failure to work said premises with at least .....

persons employed for the space of ..... consecutive days may be considered a violation of this covenant.

To well and sufficiently timber said mine at all points where proper, in accordance with good mining; and to repair all old timbering wherever it may become necessary.

To allow said lessor and his agents to enter upon and into all parts of said mine for the purpose of inspection, with use of all passages, ropes, windlass, ladder-ways, and all other means of ingress and egress for such purpose.

To not assign this lease, or any interest thereunder, and to not sublet the said premises or any part thereof, without the written assent of said lessor, and to not allow any person or persons except the said lessee and his workmen to take or hold possession of said premises or any part thereof under any pretense whatever.

To occupy and hold all cross or parallel lodes, dips, spurs, feeders, crevices, or mineral deposits of any kind, which may be discovered in working under this lease, or in any tunnel run to intersect said ..... lode, or by the said lessee or any person or persons under him in any manner at any point within ..... feet of the center line of said lode, as the property of said lessor; with privilege to said lessee of working the same as an appurtenance of said demised premises, during the term of this lease; and to not locate or record the same, or allow the same to be located or recorded, except in the name of said lessor.

To keep at all times the drifts, shafts, tunnels, and other passages and workings of said demised premises thoroughly drained and clear of loose rock and rubbish of all kinds.

To pay and deliver to said lessor as royalty, ... of all ore to be extracted from said premises during said term, of like assay to that retained by said lessee, delivered at ..... as soon as mined, without offset, deduction, or charge whatever, except lessor's proportion for packing.

To deliver up to said lessor the said premises, with the appurtenances and all improvements ..... in good order and condition, with all shafts and tunnels and other passages thoroughly clear of rubbish and drained, and the mine in all points ready for immediate continued working (accidents not arising from negligence alone excusing), without demand or further notice, on said ..... day of

....., A. D. ....., at noon, or at any time previous, upon demand for forfeiture.

And finally, upon the violation by said lessee, or any person under him, of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of said lessor, expire, and the same and said premises with the appurtenances shall become forfeit to said lessor; and said lessor or his agent may thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force, and with or without process of law; or at the option of said lessor, the said tenant and all persons found in occupation may be proceeded against as trespassers from the beginning of said term both as to realty and the ore served therefrom; or as guilty of unlawful detainer.

Each and every clause and covenant of this indenture shall extend to the heirs, executors, and administrators of all parties hereto; and to the assigns of said lessor; and as said lessor may elect, to the assigns of said lessee.

In witness whereof, The said parties, lessor and lessee, have hereunto set their hands and seals the day and year first above written.

..... (Seal.)

..... (Seal.)

(Here add acknowledgment before Notary Public.)

Section 1041.—OIL AND GAS LEASES.—The law is more strictly applied to leases for oil and gas purposes than to any others. Other minerals, being of solid formation, are in place within certain boundaries, or, being placer, yet are not usually shifting nor fluctuating. Oil and gas are fugitive and wandering, and their existence within the limits of a particular tract is uncertain. Some of the principles of law applied to oil and gas leases are as follows:—

(a)—Right to Bore for Oil Necessarily Exclusive.—The Supreme Court of the United States has decided that the right to bore for oil or gas within a given area is necessarily exclusive, owing to the peculiar nature of the operations. Therefore, if the owner of land leases to another the right

to bore for oil or gas within a certain described area, he is prohibited, whether expressed in the lease or not, from boring another well therein himself, and he may be prevented by injunction from interfering with the exclusive rights of the lessee. (Decided by the Supreme Court of the United States in the case of Brown vs. Spillman, which decision is printed in Volume 155 of the United States Supreme Court Reports, page 665.)

(b)—Lessee Must Begin Operations Within a Reasonable Time.—If the lease is silent as to the time when the lessee must begin boring, the law fills the gap by providing that he must begin operations within a reasonable time. What is a reasonable time will depend upon the particular case and all the circumstances; for instance, the nature of the country, the ease or difficulty with which machinery may be brought on the ground, the availability of labor, etc.

(c)—Failure to Commence Work Forfeits the Lease.—Although the lease is for a definite term, yet a failure to commence work within the time named, or, if no time is named, within a reasonable time, forfeits the lease.

(d)—Work Must Be Prosecuted with Diligence.—When work is once begun, it must be carried on with diligence. This does not mean every day, or every hour. But there must not be any unreasonable or prolonged cessation from actual operations. The work must be carried on so steadily, and with such practical application, as will show the good faith of the lessee.

(e)—Lease Must Be Literally Complied With.—An oil lease must be literally complied with. If the lessee agrees to sink a well of a certain bore, he will not comply with his lease by sinking a well of a smaller bore. He must give it the size and capacity agreed on.

(f)—Failure to Find Oil.—Where the lease is for a fixed period, and as much longer as oil is found or produced in paying quantities, if oil is not found in paying quantities within the time, the lease is forfeited.

(g)—Net Proceeds.—Where the lessee agrees to pay the lessor one-tenth, or any other portion, of the profits realized from the sale of the oil produced, the word "profits" does not mean the gross output, but only the net amount realized after deducting expenses.

(h)—Failure to Pay Royalty.—A failure to pay the royalty agreed on by the lessee will forfeit the lease, at the option of the lessor.

Section 1042.—FORM OF OIL LEASE.—The following is a form of oil lease. The lease, if it is to be recorded, should be acknowledged.

THIS LEASE, Made the ..... day of ....., A. D. 19.., by and between .....
....
....
of the County of ....., State of California, lessor.., and .....
....
....
lessee...

WITNESSETH: That said lessor.., for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained on the part and behalf of said lessee.. to be paid, kept, and performed, does by these presents grant, remise, and let unto said lessee.., the exclusive right, privilege, and easement of sinking, boring, developing, and working to any desired depth, wells for the extraction of natural gas, petroleum, kerosene, coal oil, and other oil, gaseous and volatile substances, and of taking from such wells, and appropriating, having, using, and disposing of any and all of said substances, in all the certain tract of land situate in the County of ....., State of California, described as follows, to-wit: .....

....

(Here describe land.)

....

....

....

and also the right, privilege, and easement of conducting and carrying away from said wells and other wells that may be sunk or bored by said lessee.. on adjacent and contiguous lands through pipes underground, as hereinafter provided, all natural gas, petroleum, kerosene, coal oil, and other oil, gaseous, and volatile substances extracted from said wells.

To have and to hold all of said rights, privileges, and easements unto said lessee.. exclusively from the ..... day of ....., A. D. 19.., for and during the term of ..... years, with the right to said lessee.. to a renewal of this lease from said lessor.. for a second term of ..... years, from and after the expiration hereof upon the terms hereinafter provided.

Said lessor.. further agrees that said lessee.. may occupy and use at one or more places on said tract of land, an area not to exceed ..... acres, upon which to sink a well, wherever a well may be bored thereon. A piece of land shall be selected without unnecessary injury to the lessor.., of such shape as the lessee.. may desire for boring such wells and operating the machinery used in boring, working, and casing the same, and care and storage of the product, said piece of land to be so used so long during the term of this lease as is necessary for said purposes.

It is further understood, that should any natural gas, petroleum, kerosene, coal oil, or other oil, gaseous or volatile substances be produced from said wells, or from wells sunk or bored by the lessee on adjacent or contiguous lands, the said lessee shall have the right to enter upon said lands and dig trenches from said wells through said lands, without unnecessary injury to the lessor; and lay pipes therein for conveying away therefrom any and all of said substances, provided the top or upper surface of said pipes are laid at least ..... inches below the surface of the ground, and the trenches in which they are laid are well filled in with earth so as not to interfere with the full and free cultivation or other use or enjoyment of said lands by the lessor, but no such trenches are to be dug

so as to interfere with the use of or to injure .....
..... or other improvements on said premises at the time such trenches are dug, and none are to be dug through any .....
without giving the owner written notice thereof, and paying therefor the value of all property injured or destroyed thereby; and no pipe is to be laid across any creek or slough so as in any way to obstruct or interfere with the free and full flow of water through the same, and all pipes laid through said lands are to be made tight and secure so as not to permit the escape therefrom of any substances injurious to any property, and should any such substance escape from such pipes and injure any such property (and the lessee should fail to repair such pipes and prevent such escape and stop such injury, within ..... days after receiving from the lessor a written notice so to do), then the lessee shall be liable for and shall pay to the owner all damages so caused.

It is further understood and agreed by and between the parties hereto, that the lessee, so long as this lease remains in full force, is to be the sole and exclusive owner for and during the full term of this lease, and of every renewal thereof, of all natural gas, petroleum, kerosene, coal oil, and other oil, gaseous and volatile substances extracted from wells on said land; and the lessor shall have no right during the continuance of this lease or any renewal thereof before default in the payment of the royalty hereafter mentioned, to bore or sink any well or wells for natural gas, petroleum, kerosene, coal oil, or other oil, gaseous or volatile substances on any of said land, or to use or take any such substances therefrom; but the lessor is at all times to be the sole and exclusive owner of all water that may flow therefrom, provided that the lessee may use sufficient of said water to operate and run any steam engines and boilers used at or near said well for boring or working the same, and subject to the uses herein provided, shall permit the flow of water from said wells for the use and benefit of the lessor, so far as the same may flow without interfering with the proper use of the wells by the lessee.

And the lessee shall have the right at all times during the continuance of this lease or any renewal thereof, to enter upon and pass over said land to and from all wells bored thereon as herein provided; but he is to do no damage to any of said premises without paying a fair and reasonable

compensation therefor within ..... days after such damage is done, and will give the lessor notice in writing before commencing to bore a well on any portion of said land.

It is further understood and agreed, that the lessee shall at all times during the existence of this lease have the right to enter upon and remove from said land all improvements, machinery, well-casing, and all other property placed by him thereon or in wells thereon.

It is further understood and agreed, that the lessee shall, so long as this lease remains in force, pay to the lessor the value at the well or wells of the ..... part of all the gas, oil, or other products herein mentioned, said value to be ascertained and fixed at the point of production, on or before the ..... day of each month, and payment shall be made on the ..... day of each and every month for all gas, oil, or other products produced during the preceding calendar month.

It is expressly and distinctly understood and agreed between the parties hereto, that it shall at all times be the privilege of the lessee to discontinue and terminate this lease by a failure to pay any installment of monthly royalty within ..... days after the same becomes due as herein provided, and such failure shall operate ipso facto as a surrender of this lease, and upon such surrender the lessee shall be discharged from all liability to pay any rent to become due by the terms of this lease.

And should any well or wells bored or sunk on said land as herein provided be abandoned by the lessee, he shall give the lessor ..... days' written notice of his intention to abandon the same. If the lessor so desires, and shall pay to said lessee within ..... days the costs of the casing already in said well or wells, the lessee agrees to sell the same to the lessor at the actual cost of said casing delivered at the mouth of the well, and thereupon the lessor shall become the owner of such well or wells and all of the products thereof of any kind or nature.

Nothing herein contained is to be so construed as to affect the right of the lessor to fully possess, occupy, and enjoy said lands subject to the conditions herein expressed in favor of the lessee.

It is understood and agreed between the parties hereto that wherever the term lessor is used in this lease, it

extends to and includes the heirs, executors, administrators, and assigns of the lessor named herein; and the term lessee extends to and includes the heirs, executors, administrators, and assigns of the lessee herein named.

And now it is further understood and agreed by all the parties hereto, that if none of said natural gas, oil, or other kindred substance is found in or near said lands, and the lessee does not proceed to develop said leased lands within ..... months from this date, and complete a well within ..... months thereafter, then this lease shall terminate and be of no value, otherwise to remain in full force and effect.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

..... (Seal.)
..... (Seal.)

Section 1043.—MINING DEEDS.—A mining claim may be sold and transferred by deed, either before or after a patent has been applied for or obtained. The locator of a mining claim obtains the legal title by his location, and may transfer his title at any time.

Section 1044.—FORM OF MINING DEED.—The following is a form of mining deed for quartz. If used for placer claim, the description should be changed so as to apply:—

THIS INDENTURE, made the ..... day of ....., in the year of our Lord one thousand nine hundred and ....., between ...., of the County of ....., and State of California, party of the first part, and ...., of the County of ....., and State of California, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of ..... Dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise,

release, and forever quitclaim, unto the said party of the second part, his heirs and assigns, the ..... lode, as located, surveyed, recorded, and held by said party of the first part, situated in ..... mining district, ... County, State of California, and named and called ..... Mine, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues, and profits thereof; and also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever. In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

..... (Seal.)

(Here add acknowledgment before Notary.)

Section 1045.—WORKING MINE ON SHARES.—A valid agreement may be made for the working of a mine on shares, and such agreement does not constitute and will not be considered a lease of the mining claim. Under such a contract, the parties have a common interest in the products of the mine when taken out. Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed and to be paid for by a share of the profits realized from such labor. (Decided by the Supreme Court of California in the case of Hudepahl vs. Liberty Hill Mining Co., which decision is printed in Volume 80 of the California Reports, page 553.)

Section 1046.—WHEN BOUNDARY MARKS ARE SUFFICIENT.—The boundary marks are always sufficient to sustain a location if they are so distinct and plain that the claim can be identified on the ground. In a case in Siskiyou County, two adjoining mining claims were each marked at the corners by four stakes about a foot and a half long, flattened on two sides, and driven into the ground about four inches; two stakes being at the ends of the dividing line common to both claims; some stakes being in the brush, and others in the open ground. In the middle of the dividing line was a tree blazed on both sides, on one of which the notices of location were posted, describing the claims by courses and distances, running from the tree to a stake, and from stake to stake to point of beginning. The ledge on both claims had been sufficiently developed to show its existence and direction. The Supreme Court held that the law as to marking the location on the ground was sufficiently complied with, under the most stringent construction of the law. (Decided by the Supreme Court of California in the case of Eaton vs. Norris, which decision is printed in Volume 131 of the California Reports, page 561.)

Section 1047.—ERROR IN DESCRIPTION IN LOCATION NOTICE.—The description in a notice of location of a mining claim, specifying the number of acres claimed, is sufficient, if it designate the land by the adjoining tracts on the north, east, and south, and by unoccupied lands on the west; and the insertion of the wrong legal subdivisions will not invalidate it. (Decided by the Supreme Court of California in the case of Duryea vs. Boucher, which decision is printed in Volume 67 of the California Reports, page 141.)

Section 1048.—CHARACTER OF ANNUAL ASSESSMENT WORK.—Whether the character of the annual assessment work is of the kind required by law is always a question of fact, to be determined by the surrounding circumstances. Not all expenditures made with a view to

working a mine would be considered work expended upon a mine for the purpose of holding it; as, for instance, work done at a distance from the mine in the construction of a mill. On the other hand, it has been decided that the services of a watchman looking after the buildings erected to work a mine properly constitutes assessment work, though the mine is idle at the time. (Decided by the Supreme Court of California in the case of Altoona Quicksilver Mining Co. vs. Integral Quicksilver Mining Co., which decision is printed in Volume 114 of the California Reports, page 100.)

Section 1049.—TIME WITHIN WHICH RELOCATION CAN BE MADE.—The law of California gives to the occupant of a mining claim thirty days after the expiration of the year within which to file his affidavit of assessment work done, in the office of the County Recorder; and the mine is not open to relocation until after the expiration of the thirty days. For instance, the occupant has the whole of the calendar year succeeding the date of his location in which to do his assessment work; then he has thirty days more in which to file his affidavit of work done with the County Recorder, and no relocation can be valid within such times. (Decided by the Supreme Court of California in the case of Harris vs. Kellogg, which decision is printed in Volume 117 of the California Reports, page 484.)

Statutes of 1891, page 219.

Section 1050.—RESUMPTION OF WORK.—As already stated, the locator of a mining claim must expend upon it in labor or improvements $100 each year, and non-compliance with this requirement renders the claim subject to relocation by others, unless, before such relocation, the original locator, his heirs, assigns, or legal representatives, have resumed work upon the claim. This resumption of work, however, must be bona fide in character and with the

intention of completing the amount of work due. It is not sufficient, when the claim has become subject to relocation, for the claimant to go upon it and do a few hours' or a few days' work, and then quit, thinking that he has thus, by such perfunctory resumption, done all that is sufficient to hold his claim for another year; he must resume work in good faith, with the intention of completing the full amount required by law. (Decided by the Supreme Court of California in the case of McCormick vs. Baldwin, which decision is printed in Volume 104 of the California Reports, page 227.)

Section 1051.—FAILURE TO COMPLY WITH LOCAL CUSTOMS IN WORKING MINING CLAIMS.—A right to hold and work a mining claim when acquired may be lost by a failure or neglect to comply with the rules and regulations of the miners, relative to the acquisition and tenure of claims, in force in the district where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer. (Decided by the Supreme Court of California in the case of St. John vs. Kidd, which decision is printed in Volume 26 of the California Reports, page 263.)

Section 1052.—OVERLAPPING LOCATIONS.—It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. When this occurs, the law of California is, in so far as the ground taken was vacant, each location, if properly made in other respects, is valid and sufficient to that extent. As to the ground actually covered by the two locations, the right will be determined by ascertaining which location was first made. If A makes a location to-day, and B makes a location to-morrow, and the location of B covers a part of the ground located by A the day before, B will lose so much of his location as overlaps the location

of A; for A was first in time, and thus acquired a prior right. But B will not lose his whole location. So much of it as does not overlap the prior location will be good, and he can hold that much. (Decided by the Supreme Court of California in the case of Doe vs. Tyler, which decision is printed in Volume 73 of the California Reports, page 21.)

Section 1053.—INTERSECTING VEINS.—Where two veins or lodes of mineral belonging to different owners intersect, the owner of the vein which was first located has the right to the ore in the space of intersection, but the other owner has a right of way through such space for the purpose of working his vein. (Decided by the Supreme Court of California in the case of Wilhelm vs. Silvester, which decision is printed in Volume 101 of the California Reports, page 358.)

Section 1054.—RULE THAT END LINES SHALL PARALLEL EACH OTHER.—The Revised Statutes of the United States say that "the end lines of each claim shall be parallel with each other." But this does not mean that the two end lines must be **exactly** parallel. In the case of Doe vs. Sanger, a San Bernardino County mining suit, the Supreme Court of California stated the true rule as follows: "It has been held that the provisions of the Federal statutes relating to lode claims were passed with the understanding, founded upon the general practice of miners, that the surface locations of such claims will be made lengthwise along the general direction of the lode or vein in the general form of a parallelogram, with the side lines along the lode, and the end lines across it. But suppose that a surface location should be made, for instance, in the shape of an octagon. In such a case there would be no end lines and no side lines, and if the locator could go outside his lines in one direction he could do so in eight directions, and encroach upon his neighbors from every

point of the compass. If, however, a location is made in substantial compliance with the intent of the statute—that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct, and apparent—such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel." (Decided by the Supreme Court of California in the case of Doe vs. Sanger, which decision is printed in Volume 83 of the California Reports, page 203.)

Section 1055. — EXTRA-LATERAL RIGHT, OR RIGHT TO PURSUE THE VEIN OR LODE ON ITS DIP BEYOND THE SIDE LINES OF THE CLAIM.— Section 2322 of the Revised Statutes of the United States provides: "The locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations." A mineral vein or lode seldom or never descends vertically into the earth, but on its downward course makes an angle with the vertical—or, in popular terms, it does not go straight down, but in a slanting direction—so that, if followed far enough into the interior of the earth, it will eventually be found to extend outside of the side lines of the claim. In other words, the vein eventually reaches the point in the interior of the earth where, if a vertical line were run to the surface it would strike a point outside the surface boundaries of the claim. The right to thus follow the vein on its downward course beyond the side lines of the claim is sometimes called the extra-lateral right, and is conferred by the Section

of the Revised Statutes of the United States just quoted. In thus following the vein on its dip, the miner is confined, however, to that part of it which is found between the end lines of his claim extended in their own direction. The law prescribes that the end lines of a claim shall be parallel with each other. Yet for the full enjoyment of this extra-lateral right it is important that the end lines of the claim should follow this requirement of parallelism; for it has been held by the courts that where the end lines were not parallel, but converged in the direction of the dip of the vein, the miner could not pursue the vein outside of his side lines beyond the point where his converging end lines extended met. On the other hand, where the end lines diverged in the direction of the dip, thus making the portion of the vein included within them larger the farther such end lines were extended, it has been held that the miner could not take the ore from any greater length of vein outside of his side lines than was included between his end lines as laid down on the ground.

Section 1056.—DAMAGES FOR TRESPASS ON MINING CLAIM.—One who unintentionally, and in the honest belief that he is lawfully exercising a right which he has, enters upon the mining property of another and removes his ore, is liable in damages for its value, and for no more. He may limit the recovery of the owner by deducting from the value of the ore at the mouth of the shaft the cost of mining and transporting it to that point. But one who wilfully and intentionally takes ores from the land of another is liable to him for the full value of the property taken, at the time of his conversion of it, without any deduction for the labor bestowed or expense incurred in removing it and preparing it for the market.

Section 1057.—STATE HOMESTEAD ON MINING CLAIM.—The locator of a mining claim may, under the State law, declare a homestead upon it, if he is living on

it; and when that is done it has all the characteristics of a homestead declared upon any other character of land; subject, however, to the holder complying with the requirements of the law relating to the holding of mining claims until issue of patent from the United States Government. (Decided by the Supreme Court of California in the case of Gaylord vs. Place, which decision is printed in Volume 98 of the California Reports, page 472.)

Section 1058.—SCHOOL LANDS.—The law of Congress granting certain agricultural lands to the State of California for school purposes, and providing that mineral lands shall not be subdivided into sections, public lands belonging to the State under said Act, if agricultural, which the proper United States officials have platted into a section and classified as agricultural lands, and concerning which the Receiver of the public land office has certified that the State's title thereto under said Act is free from adverse claims, are not, after their disposal by the State, subject to re-entry as mineral lands; the determination of the United States officials that the lands were agricultural being conclusive against a collateral attack. (Decided by the Supreme Court of California in the case of Saunders vs. La Purisima Gold Mining Co., which decision is printed in Volume 125 of the California Reports, page 159.)

Section 1059.—AUTHORITY OF MINE SUPERINTENDENTS TO PURCHASE SUPPLIES.—Mine Superintendents, by virtue of their position, have authority to purchase all supplies necessary for the operation of the mine, and when they do so the owners will be bound to pay for them. In one case it was held by our Supreme Court that the owner of the mine was bound to pay for provisions ordered by the Superintendent for a boarding house at which the miners lived, and the Court said: "The record discloses the fact that it was absolutely necessary that provisions should be furnished this boarding-house,

in order that the mine might continue in operation; and it would seem that, aside from any express authority from the defendant to purchase these articles, and regardless of the question of ostensible agency, the respective Superintendents of the mine, by virtue of their positions alone, had the power to bind the defendant for the payment of these goods." (Decided by the Supreme Court of California in the case of Heald vs. Hendy, which decision is printed in Volume 89 of the California Reports, page 632.)

Section 1060. — HYDRAULIC MINING.—Hydraulic mining, as the term is used in the laws of California, is mining by means of the application of water, under pressure, through a nozzle, against a natural bank. It may be carried on in this State wherever and whenever it can be done without material injury to the navigable streams, or the lands adjacent thereto.

Civil Code, Sections 1424, 1425.

Section 1061.—TAILINGS AND DEBRIS.—No person or corporation has the right to cover his neighbor's land with debris from mine or mill, nor to permit any of the tailings or refuse matter to flow or be placed on the land of another. For the violation of another's right of use and possession, by flowing or covering his land with debris, or by causing his soil to wash or cave, the owner of the mine will be liable in damages, and the injury may be stopped by injunction.

Section 1062.—CALIFORNIA DEBRIS COMMISSION.—The Congress of the United States passed an Act, in 1893, creating a commission called the California Debris Commission. The purpose of the law was to provide a means for controlling the deposit of debris in the rivers and streams in that part of California constituting the San Joaquin and Sacramento watersheds. As enacted, after creating the California Debris Commission, it declares, for

the purpose of the Act, "hydraulic mining" and "mining by hydraulic process" to have the meaning and application given to those terms in the State of California. The Act prohibits and declares unlawful such hydraulic mining "directly or indirectly injuring the navigability of said river systems, carried on in said territory, other than as permitted under its provisions." From these provisions it seems quite clear that its real intent and meaning is to prohibit and make unlawful any and all hydraulic mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California, directly or indirectly injuring the navigability of said river systems; and to permit it in all cases where the work can be prosecuted without such injury to the navigability of said river systems or to the lands adjacent thereto; and that, in order to properly determine the facts upon which the legislative will is to act, a skilled commission is created, whose duty it is to ascertain and determine what will or will not cause the prohibited injury, and to prescribe the character of impounding works, and the extent to which hydraulic mining in the territory described may be carried on without causing such injury.

Section 1063.—CONSOLIDATION OF MINING CORPORATIONS.—Two or more mining corporations owning claims lying in the same vicinity may consolidate upon terms agreed upon by the respective Boards of Directors or Trustees of such corporations, provided the written consent of stockholders representing two-thirds of the capital stock of each company be obtained. Such consolidation does not relieve the respective companies or their stockholders of existing indebtedness. In case of such consolidation, notice of the same must be given by advertising for at least one month in a newspaper in the county where the mining property is situated, and also in a newspaper published in the county where the principal place of business of any of such

corporations shall be. When the consolidation is completed a certificate thereof, containing the manner and terms of the consolidation, must be filed in the office of the County Clerk of the county in which the original certificate of incorporation of any of said companies was filed, and a copy thereof must be filed in the office of the Secretary of State. Such certificate must be signed by a majority of each Board of Directors or Trustees of the original companies; and they must within thirty days after the filing of such certificate, and after at least ten days' public notice, call a meeting of the stockholders of all of said companies so consolidated, to elect a Board of Trustees or Directors for the consolidated company for the ensuing year. The said certificate must also contain all the matters required to be stated in Articles of Incorporation.

Civil Code, Section 361.

(a)—**Transfer of Stock in Mining Corporations.**—The Civil Code of California, Sections 586, 587, makes the following particular provisions about the transfer of stock in mining corporations: "Any corporation organized in this State for the purpose of mining or carrying on mining operations in or without this State, may establish and maintain agencies in other States of the United States, for the transfer and issuing of their stock; and a transfer or issue of the stock at any such transfer agency, in accordance with the provisions of its By-Laws, is valid and binding as fully and effectually for all purposes as if made upon the books of such corporation at its principal office within this State. The agencies must be governed by the By-Laws and the Directors of the corporation. All stock of such corporation, issued at a transfer agency, must be signed by the President and Secretary of the corporation, and countersigned at the time of its issue by the agent having charge of the transfer agency."

Civil Code, Sections 586, 587.

(b)—Hours of Work in Underground Mines.—The period of employment for all persons working in underground mines in search of minerals, whether base or precious, or who are engaged in such underground mines for other purposes, or who are employed or engaged in other underground workings whether for the purpose of tunneling, making excavations or to accomplish any other purpose or design, or who are employed in smelters and other institutions for the reduction or refining of ores or metals, shall not exceed eight hours within any twenty-four hours, and the hours of employment in such employment or work day shall be consecutive, excluding, however, any intermission of time for lunch or meals; provided that, in the case of emergency where life or property is in imminent danger, the period may be a longer time during the continuance of the exigency or emergency.

Act of the Legislature, approved March 10, 1909.

(c)—Abandoned Oil Wells.—Abandoned oil wells must be filled by the owner, with clay, earth or cement mortar, thoroughly packed and tamped, to a point above the upper oil-bearing strata. While withdrawing the casing, water must be effectually and permanently excluded.

Act of the Legislature, approved March 20, 1909.

PART VIII

WATER AND WATER RIGHTS

Section 1064.—APPROPRIATION OF WATER.—The right to the use of running water, flowing in a river or stream, or down a canyon or ravine, may be acquired in California by appropriation. Appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purposes, the right ceases.

Civil Code, Section 1410, 1411.

Section 1065.—NOTICE OF APPROPRIATION.—A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point on the stream where he intends to take the water from it. This notice must state (1) that he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purpose for which he claims it, and the place of intended use; (3) the means by which he intends to divert it; (4) and the size of the flume, pipe, or aqueduct in which he intends to divert it from the stream.

Statutes of 1903, page 361.

Section 1066.—NOTICE MUST BE RECORDED.—A copy of the notice of appropriation must be recorded, within ten days after it is posted, in the office of the Recorder of the county in which it is posted.

Statutes of 1903, page 361.

Section 1067.—CHANGE OF PLACE OF INTENDED DIVERSION.—The law passed in 1903, above stated, provides that after filing the notice of appropriation for record, "the place of intended diversion, or the place of

intended use, or the means by which it is intended to divert the water, may be changed by the person posting said notice, or his assigns, if others are not injured by such change." But the law does not state in what manner the change shall be made, whether by posting and recording a new notice, or in some other way indicating the intention to change the place of diversion, the place of intended use, or the means of taking the water. The law being uncertain in this particular, it would be well to file a new notice for record stating the change.

Statutes of 1903, page 361.

Section 1068.—FORM OF NOTICE OF APPROPRIATION.—The following is a form of notice of appropriation, to be posted and recorded as stated in preceding Sections. The notice should be posted at the outlet or point of diversion on the bank of the stream:—

Notice of Claim of Water.

The undersigned claims the water running in this stream to the extent of ..... (state number of inches) inches, measured under a four-inch pressure.

I claim the water for .....

(Here state purpose for which water is to be used.)

....

and I intend to use it at .....

(Here state place where water is to be used.)

....

I intend to divert the water by means of .....

.....

(Here state whether it is intended to use a flume, pipe, ditch,

....

or aqueduct.)

....

The size of the flume (or ditch, or aqueduct, as the case may be) in which I intend to divert said water will be ..... (here state size.)

.....

Claimant.

Notice posted ..... 19...

Section 1069.—WHEN WORK MUST BE COMMENCED.—The Legislature of 1907 passed an act regulating the commencement of work, which reads as follows: "Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; provided, that the erection of a dam has been recommended by the California debris commission at or near the place where it is intended to divert the water; and, provided further, that if it shall be necessary, by proceedings in eminent domain, to acquire water rights held by adverse riparian owners or to acquire sites for dams or power plants at the point of intended diversion or the point of intended use, as described in the notice of appropriation of said water, or if there shall be conflicting claims to the waters so appropriated, then the party so appropriating, or his assigns, shall have sixty days after the determination of legal proceedings by final judgment in which to commence to excavate or construct the works in which he intends to divert the water as provided in this section; and provided further, that if suits for such purpose are not already pending at the date of the passage of this Act, they shall be commenced within sixty days after this Act takes effect, and as to future appropriations of water, within sixty days after notice of such appropriation is posted as required by law, and such proceedings shall be prosecuted diligently to final judgment; but nothing in this Act shall be construed to revive or renew appropriations of water heretofore made which have been abandoned and lost, as against subsequent claimants who have complied with this Act.

Act of the Legislature, in effect May 21, 1907.

Section 1070.—FORFEITURE OF CLAIM.—A failure to comply with the law, as to notices, commencement of work, or completion of the work by diligently prosecuting it, will forfeit the right of the claimant to the use of the water, as against a subsequent claimant who does comply with the law.

Civil Code, Section 1419.

Section 1071.—RIPARIAN RIGHTS.—The owner of land upon a stream has a right to the use of water, which is called a riparian right. He is entitled, without making an appropriation under the law, to have the use of water flowing by his land for any purpose to which it can be applied beneficially—for supplying his natural wants, including the use of the water for the domestic purposes of his home or farm, such as drinking, washing, or cooking, and for his stock. This is what is called a riparian right, and the owner of land upon both navigable and unnavigable streams is called a riparian proprietor. As such, he is entitled to have the stream which washes his land flow in its natural channel, without diminution or alteration. It may be subject to condemnation for public use, but it cannot be condemned for public use without full compensation being made to the riparian proprietor for its loss. And he may insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed channel and at its usual level. His right to the use of the water is not a mere easement, but is inseparably annexed to the soil itself. It does not in any way depend upon appropriation, but is a part of the land, and goes with the land from owner to owner, as conveyances may be made. He may take the water from its natural channel, and carry it on to other parts of his land, provided he turns it back into the channel again to his neighbor below. However, his use of the water must be reasonable, so as to let it flow on when he is through with it, so that others

may also have the benefit of their riparian right in the use of the water, for the natural wants of other proprietors. He must see to it that the surplus, after he uses the water, is returned to the stream, for the use of those below. He is never allowed, as against a lower proprietor, to use all the water of the stream on his own land, unless such use is absolutely necessary for strictly domestic purposes and to furnish drink for man and beast.

Section 1072.—PROTECTION OF RIPARIAN RIGHTS.—The courts of California will protect the riparian proprietor, by issuing an injunction against any one who interferes with his proper use and enjoyment of the water. The courts will also allow him damages for injury to his premises, against any one who deprives him of his use of the water.

(a)—**Manner of Using Water.**—One making an appropriation of water from a natural stream may make use of any natural or artificial channel available and convenient for the purpose of conducting the water, so long as other persons interested in such conduit do not object, and his appropriation so made will be as effectual as if he had carried it through a ditch or pipe-line made for that purpose and no other. A person making an appropriation of water from a natural stream need not construct any head-gate at the place of diversion, and if a simple cut will accomplish the purpose of diverting the water from the stream, it is, if accompanied with a beneficial use, a good appropriation as against others making a subsequent diversion and use. (Decided by the Supreme Court of California in the case of Lower Tule Ditch Co. vs. Angiolo Water Co., which decision is printed in Volume 86 of the Pacific Reporter, page 1081.)

Section 1073.—WATER RIGHTS ON PUBLIC LAND.—From the earliest times in California it has been customary to divert water on the public lands for mining,

agricultural, and other purposes, and this right was, in 1866, confirmed and approved by Act of Congress. Therefore, the occupant of public land who is living on it in good faith has the right, whether the land is surveyed or unsurveyed, to appropriate water flowing in a stream, canyon, or ravine, and take it to his land for agricultural, mining, or domestic purposes. It will make no difference whether he has or has not obtained a legal title to the land he occupies. If he is an occupant of the land, claiming under the laws of the United States, this will be sufficient to entitle him to appropriate water for use on the land. (Decided by the Supreme Court of California in the case of Ely vs. Ferguson, which decision is printed in Volume 91 of the California Reports, page 187.)

Section 1074.—OBTAINING TITLE BY PRESCRIPTION.—A right to the use of water may be obtained by prescription. That is, one who has been continuously using water, conveyed in a ditch, flume, or aqueduct, for five years, claiming the right as against the world, obtains a title to the water by reason of such possession adverse to others. A party may obtain a prescriptive title to the water of a stream by using it on vacant government land; if a lawful use of the water is made, it makes no difference who is the owner of the land upon which it is used. (Decided by the Supreme Court of California in the case of Southern California Investment Company vs. George Wilshire, which decision is printed in Volume 28, California Decisions, page 80.)

Section 1075.—WATER FOR IRRIGATION.—Under the law of riparian rights, the riparian proprietor has the right to use a reasonable amount of the water of a stream running through his premises for irrigating his riparian land, but he has not the right for that purpose to take all the water which flows in the stream at the point where he

diverts it. What is a reasonable amount of water for irrigation is a question that must depend upon the particular circumstances of each case in which it arises, and it is a question which is frequently of difficult solution; but it is settled in California that in no case can a riparian proprietor, for the purpose of irrigation, use all the water of the stream, and thus leave a lower proprietor without any. And while he may use a part of the water of the stream to irrigate his land, the land irrigated must be riparian; that is, the land irrigated must be the land through which the stream flows. He cannot take the water away to other land, although owned by him. He is restricted in the use of the water for irrigation to the land through which the stream flows. (Decided by the Supreme Court of California in the case of Gould vs. Stafford, which decision is printed in Volume 91 of the California Reports, page 146.)

Section 1076.—IRRIGATION DISTRICTS.—So urgent has been the need of water for irrigation in California, so vast the interests involved, the Legislature of the State has endeavored, from 1889 to 1909 particularly, to create a system of irrigation districts and a method of using the water for irrigation. The laws enacted have provided for the issuance and sale of bonds, and the expenditure of immense sums of money. But the practical working of all these laws has been attended by so many conflicting and intricate questions, the validity of bonds has been attacked so many times, and so much litigation has followed, that a statement of the law of California, as applied to irrigation districts, cannot be attempted in this book. For the law cannot be said to be definitely settled yet, as to rights, powers, or properties of irrigation districts, or as to the rights and privileges of individuals in relation to them. The various Acts of the Legislature of California on irrigation districts may be found in the "General Laws of California," page 436, and in Statutes of 1909.

Section 1077.—WATER FOR MINING.—The Statutes of the United States provide: "That whenever, by priority of possession, rights to the use of water for mining have accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights are protected in the same, and the right of way for the construction of ditches and canals, they are hereby acknowledged and confirmed."

Revised Statutes of the United States, Section 2339.

(a)—The California Statute.—In California, the Legislature has provided by law that the owner of a mine is entitled to a right of way through or over other mines, for ditches, canals, or tunnels used in the working of his mine. He may therefore bring water to his mine in a ditch or flume over another mining claim, or, if necessary, in a tunnel through another mine. Of course, if by constructing a ditch, flume, or tunnel, to carry water to a mining claim, damage is done to other property over or through which it passes, the owner of the damaged property must be recompensed for his loss.

Statutes of 1891, page 220.

(b)—First Appropriator Has First Right.—The law about riparian rights does not apply to mining. For mining purposes, the first appropriator has first right. An appropriation of water for mining purposes is made in the same manner as an appropriation of water for other purposes, which has already been stated.

(c)—Miner's Inch of Water.—The standard miner's inch of water, in California, is fixed by law as equivalent or equal to one and one-half cubic feet of water per minute measured through any aperture or orifice.

Statutes of 1901, page 660.

Section 1078.—SUBTERRANEAN WATERS—THE CASE OF KATZ VS. WALKINSHAW.—A novel and interesting question, involving immense individual and corporation investments, has been before the Supreme Court of California, and received a final determination. It relates to subterranean waters, whether flowing in underground channels, or percolating through the earth and collecting in a given spot. The dispute occurred in San Bernardino County, and the case of Katz vs. Walkinshaw has become celebrated in this State, deciding, as it does, that the right of a land-owner to take and use subterranean, percolating waters, and divert the same from land of an adjoining owner, is limited to a reasonable use in connection with the use of his own land, and does not authorize him to appropriate such waters by artesian wells and sell the water for the irrigation of distant lands, to the detriment of adjoining land-owners. The case has been in the Supreme Court twice, the first decision being written by Judge Temple and the last by Judge Shaw. The Superior Court of San Bernardino County decided the case in favor of the defendant, who had sunk a well on his land, and thereby drew off the water from the well of his neighbor; but the Supreme Court reversed this decision and decided the case in favor of the plaintiff. The following extracts from the opinion prepared by Judge Temple in the Supreme Court will give the interesting and very important points involved:—

"The action was brought to enjoin defendant from drawing off and diverting water from an artesian belt, which is in part on or under the premises of plaintiffs, and to the water of which they have sunk wells, thereby causing the water to rise and flow upon the premises of plaintiffs and which had constantly so flowed for twenty years before the wrong complained of was committed by defendant. The water is necessary for domestic purposes and for irrigating the lands of plaintiffs, upon which there are growing trees,

vines, shrubbery, and other plants, which are of great value to plaintiffs.

"These facts are admitted, and further that defendant is diverting the water for sale, to be used on lands of others distant from the saturated belt from which the artesian water is derived.

"The plaintiffs contend that this subsurface water constitutes an underground stream, and that plaintiffs are riparian thereto, and as such riparian owners they are seeking relief in this case.

"The defendant denies that she is taking or diverting water from an underground stream or water-course, and alleges that all the water which arises, in the artesian wells on her premises, and which she is selling, is percolating water, and is parcel of her premises, and her property.

"In effect, therefore, while denying that she is doing any act of which plaintiffs can complain, she really only denies that she is diverting water from an underground water-course, and asserts her right to dispose of the water in the manner alleged, because it is percolating water, not confined to a definite water-course.

"The so-called artesian belt includes several square miles of territory. It is a large accumulation of earth upon the base of very high mountains, and is composed of detritus of varying quantity and material, with no regular stratification. Wells have been sunk at least to the depth of 750 feet, but no bed-rock has been found. It has quite an incline from the mountain, and is from 700 to 1,500 feet above sea level. Mr. F. C. Finkle, a civil engineer, was the chief witness for the plaintiffs, and testified both as to facts palpable to the senses, and as an expert. He says, the saturated land is fed: First, by the underflow from the numerous ravines, canyons, and streams which enter the valley from the mountains; and, secondly, by the rain and flood-water upon and absorbed upon the slope and between the artesian belt and the mountains. This water percolating down into the soil, and constantly pressed forward by water

accumulating, finally gets under partially impervious earth, where it is held under sufficient pressure to create the artesian belt. The banks of this supposed sub-surface stream, the witness thought, were on the west, 'a cemented dyke which runs throughout the valley, and the eastern boundary of it is the clay bank or dyke at the south side of the Santa Ana River.' Within these limits many ravines enter from the mountains, some of them carrying at times great quantities of water, much of which had been appropriated and carried off in pipes or cemented aqueducts.

"It is evident that if there is any flow to this underground body of water thus held under pressure, it is by percolation. The witness stated that the process was the same the world over. The lower lands are saturated from above. 'It is done by saturation from the rainfalls and the floods, and percolation through voids in the soil.'

"It is quite manifest that this body (if it can be so styled) of percolating water cannot be called an underground water-course to which riparian rights can attach, unless we are prepared to abolish all distinction between percolating water and the water flowing in streams with known or ascertainable banks, which confine the water to definite channels. All rain water which falls upon the hills and mountain sides which does not flow off at once, as surface water, is absorbed and percolates down in the same way to the valley below. No doubt limits can be found to every such flow, as in this case. The distinction is well established and, in some respects, different rules of law applied to the two cases. The plaintiffs therefore cannot establish their claims upon the theory of an underground water-course to which they are riparian.

"But the appellants contend that, though they are not riparian to an underground water-course, and although the saturated belt carries only percolating water, still they are entitled to the injunction prayed for.

"It is obvious, at once, that the analogy between the right to remove sand and gravel from the land for sale, and to

remove and sell percolating water is not perfect. If we suppose a saturated plain, one may remove and sell the sand and gravel from his land without affecting or diminishing the sand and gravel on the lands of his neighbors. If the water on his lands is his property, then the water in the soil of his neighbors is their property. But when he drains out and sells the water on his land, he draws to his land and also sells water which is the property of his neighbor. And the effect is similar in other respects. By pumping out the water from his lands he can, perhaps, deprive his neighbors of water for domestic uses, and, in fact, render their land valueless. In short, the members of the community, in the case supposed, have a common interest in the water. It is necessary for all, and it is an anomaly in the law if one person can for his individual profit destroy the community and render the neighborhood uninhabitable.

"We have derived our law, in respect to subterranean waters, as in other respects, mostly from England, but in regard to this matter the first cases are quite modern. Even yet the text-books on water rights have but little to say upon the subject of percolating water. Such law as has been made upon the subject comes from countries and climates where water is abundant, and its conservation and economical use of little consequence as compared with a climate like Southern California. The learned counsel for appellants state in their brief, that water at San Bernardino is worth $1,000 per inch of flow. Percolating water or water held in the earth, is the main source of supply for domestic uses, and for irrigation, without which most lands are unproductive. It is also stated that speculators are seeking to appropriate the percolating water, by getting title to some part of a water shed or slope, and by running canals and tunnels, and by sinking, to obtain water for sale. It is asserted that the lands naturally made moist by percolating water are very productive, and were first settled upon, and have been most highly improved; and he asks whether these lands are to be converted into deserts,

because speculators may pump and carry away to some distant locality the sub-surface waters which render the land fertile. Certainly no such case as this has come before a court, or could well exist, in England, or in the Eastern States.

"No doubt the land proprietor owns the water which is parcel of his land, and may use it as he pleases, regard being had to the rights of others. It is not unreasonable that he should dig wells in order to have the fullest enjoyment and usefulness of his estate, or for pleasure, trade, or whatever else the land as land may serve. But to fit it up with wells and pumps of such persuasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff, and others whose lands are thus clandestinely sapped, and their value impaired."

A rehearing was granted by the Supreme Court, and on November 28th, 1903, another and final decision was made by the full court, and the former opinion given by Judge Temple was approved and sustained in every particular. Upon the final determination of the suit, Judge Shaw prepared the opinion. It is extremely interesting and valuable. Following are extracts showing the principal points in Judge Shaw's opinion:—

"A rehearing was granted in this case for the purpose of considering more fully, and by the aid of such additional arguments as might be presented by persons not parties to the action, but vitally interested in the principle involved, a question that is novel and of the utmost importance to the application to useful purposes of the waters which may be found in the soil.

"Petitions for rehearing were presented not only in behalf of the defendant, but also on behalf of a number of corporations engaged in the business of obtaining water from wells

and distributing the same for public and private use within this State, and particularly in the southern part thereof. Able and exhaustive briefs have been filed on the rehearing. The principle decided by the late Justice Temple in the former opinion, and the course of reasoning by which he arrived at the conclusion, have been attacked in these several briefs and petitions with much learning and acumen. It is proper that we should here notice some of the objections thus presented.

"Many arguments, objections, and criticisms are presented in opposition to the rules and reasoning of the former opinion. It is contended that the rule that each landowner owns absolutely the percolating waters in his land, with the right to extract, sell, and dispose of them as he chooses, regardless of the results to his neighbor, is part of the common law, and as such has been adopted in this State.

"The true doctrine is that the common law by its own principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances, a principle adopted into our code by Section 3510, Civil Code: 'When the reason of a rule ceases, so should the rule itself.' Whenever it is found that, owing to the physical features and character of this State, and the peculiarities of its climate, soil, and productions, the application of a given common law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, requires that a different rule should be adopted, one which is calculated to secure persons in their property and possessions, and to preserve for them the fruits of their labors and expenditures. The question whether or not the rule contended for is a part of the common law applicable to this State, depends on whether it is suitable to our conditions under the rule just stated.

"It is necessary, therefore, to state the conditions existing in many parts of this State which are different from those existing where the rule had its origin.

"In a large part of the State, and in almost all of the southern half of it, particularly south of the Tehachapi range of mountains, aside from grains, grasses, and some scant pasturage, there is practically no production by agriculture, except by means of artificial irrigation. In a few places favored by nature, crops are nourished by natural irrigation, due to the existence underneath the ordinary soil of a saturated layer of sand or gravel, but these places are so few that they are of no consequence in any general view of the situation. Irrigation in these regions has always been customary, and under the Spanish and Mexican governments it was fostered and encouraged. Even in the earlier periods of the settlement of the country, after its acquisition by the United States, and while the population was sparse and scattered compared to the present time, the natural supply of water from the surface streams, as diverted and applied by the crude and wasteful methods then used, was not considered more than was necessary. As the population increased, better methods of diversion, distribution, and application were adopted, and the streams were made to irrigate a very much larger area of land. While this process was going on, a series of wet years augmented the streams, and still more land was put under the irrigating systems. Recently there has followed another series of very dry years, which has correspondingly diminished the flow of the streams. After this period began, it was soon found that the natural streams were insufficient. The situation became critical, and heavy loss and destruction from drouth were imminent. Still the population continued to increase, and with it the demand for more water to irrigate more land. Recourse was then had to the underground waters. Tunnels were constructed, more artesian wells bored, and finally pumps driven by electric or steam power were put into general use to obtain

sufficient water to keep alive and productive the valuable orchards planted at the time when water was supposed to be more abundant. The geological history and formation of the country is peculiar. Deep borings have shown that almost all of the valleys and other places where water is found abundantly in percolation were formerly deep canyons or basins, at the bottoms of which anciently there were surface streams or lakes. Gravel, boulders, and, occasionally, pieces of driftwood have been found near the coast far below tide level, showing that these sunken stream-beds were once high enough to discharge water by gravity into the sea. These valleys and basins are bordered by high mountains, upon which there falls the more abundant rain. The deep canyons or basins in course of ages have become filled with the washings from the mountains, largely composed of sand and gravel, and into this porous material the water now running down from the mountains rapidly sinks and slowly moves through the lands by the process usually termed percolation, forming what are practically underground reservoirs. It is the water thus held or stored that is now being taken to eke out the supply from the natural streams. In almost every instance of a water supply from the so-called percolating water, the location of the well or tunnel by which it is collected is in one of these ancient canyons or lake basins. Outside of these, there is no percolating water in sufficient quantity to be of much importance in the development of the country, or of sufficient value to cause serious litigation. It is usual to speak of the extraction of this water from the ground as a development of a hitherto unused supply. But it is not yet demonstrated that the process is not in fact, for the most part, an exhaustion of the underground sources from which the surface streams and other supplies previously used have been fed and supported. In some cases this has been proven by the event. The danger of exhaustion in this way threatens surface streams as well as underground percolations and reservoirs. Many water companies,

anticipating such an attack on their water supply, have felt compelled to purchase, and have purchased, at great expense, the lands immediately surrounding the stream or source of supply, in order to be able to protect and secure the percolations from which the source was fed. Owing to the uncertainty in the law, and the absence of legal protection, there has been no security in titles to water rights. So great is the scarcity of water under the present demands and conditions that one who is deprived of water which he has been using has usually no other source at hand from which he can obtain another supply.

"The water thus obtained from all these sources is now used with the utmost economy, and is devoted to the production of citrus and other extremely valuable orchard and vineyard crops. The water itself, owing to the tremendous need, the valuable results from its application, and the constant effort to plant more orchards and vineyards to share in the great profits realized therefrom, has become very valuable. In some instances it has been known to sell at the rate of fifty thousand dollars for a stream flowing at the rate of one cubic foot per second. Notwithstanding the great drain on the water supply, the economy in the distribution and application, and the much larger area of land thereby brought under irrigation, there still remain large areas of rich soil which are dry and waste for want of water. This abundance of land, with the scarcity and high price of water, furnishes a constant stimulus to the further exhaustion of the limited amount of underground water, and a constant temptation to invade sources already appropriated. The charms of the climate have drawn, and will continue to draw, immigrants from the better classes of the Eastern States, composed largely of men of experience and means, energetic, enterprising, and resourceful. With an increasing population of this character, it is manifest that nothing that is possible to be done to secure success will be left undone, and that there must ensue in years to come a fierce strife, first to acquire and then to hold every available supply of water.

"It is scarcely necessary to state the conditions existing in other countries referred to, to show that they are vastly different from those above stated. There the rainfall is abundant, and water, instead of being of almost priceless value, is a substance that in many instances is to be gotten rid of rather than preserved. Drainage is there an important process in the development of the productive capacity of the land, and irrigation is unknown. The lands that from their situation in this country are classed as damp lands would in those countries be either covered by lakes or would be swamps and bogs. If one is deprived of water in those regions, there is usually little difficulty in obtaining a sufficient supply nearby, and at small expense. The country is interlaced with streams of all sizes, from the smallest brooklet up to large, navigable rivers, and the question of the water supply has but little to do with the progress or prosperity of the country.

"It is clear also that the difficulties arising from the scarcity of water in this country are by no means ended, but, on the contrary, are probably just beginning. The application of the rule contended for by the defendants will tend to aggravate these difficulties rather than solve them. Traced to its true foundation, the rule contended for is simply this: 'that owing to the difficulties the courts will meet in securing persons from the infliction of great wrong and injustice by the diversion of percolating water if any property right in such water is recognized, the task must be abandoned as impossible, and those who have valuable property acquired by and dependent on the use of such water must be left to their own resources to secure protection for their property from the attacks of their more powerful neighbors, and, failing in this, must suffer irretrievable loss; that might is the only protection.

" 'The good old rule
Sufficeth them, the simple plan,
That they should take who have the power,
And they should keep who can.'

" 'The field is open for exploitation to every man who covets the possessions of another, or the water which sustains and preserves them, and he is at liberty to take that water if he has the means to do so, and no law will prevent or interfere with him, or preserve his victim from the attack.' THE DIFFICULTIES TO BE ENCOUNTERED MUST BE INSURMOUNTABLE TO JUSTIFY THE ADOPTION OR CONTINUANCE OF A RULE WHICH BRINGS ABOUT SUCH CONSEQUENCES.

"We do not see how the doctrine contended for by defendant could ever become a rule of property of any value. Its distinctive feature is the proposition that no property rights exist in such waters except while they remain in the soil of the land-owner; that he has no right either to have them continue to pass into his land as they would under natural conditions, or to prevent them from being drawn out of his land by an interference with natural conditions on neighboring land.

"It is apparent that the parties who have asked for a reconsideration of this case, and other persons of the same class, if the rule for which they contend is the law, or no-law, of the land, will be constantly threatened with danger of utter destruction of the valuable enterprises and systems of water works which they control, and that all new enterprises of the same sort will be subject to the same peril. They will have absolutely no protection in law against others having stronger pumps, deeper wells, or a more favorable situation, who can thereby take from them unlimited quantities of the water, reaching to the entire supply, and without regard to the place of use. We cannot perceive how a doctrine offering so little protection to the investments in and product of such enterprises, and offering so

much temptation to others to capture the water on which they depend, can tend to promote developments in the future or preserve those already made, and, therefore, we do not believe that public policy or a regard for the general welfare demands the doctrine. An ordinary difference in the conditions would scarcely justify the refusal to adopt a rule of the common law, or one which has been so generally supposed to exist; but where the differences are so radical as in this case, and would tend to cause so great a subversion of justice, a different rule is imperative.

"The doctrine of reasonable use, on the other hand, affords some measure of protection to property now existing, and greater justification for the attempt to make new developments. It limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken. If, as is claimed in the argument, such water-bearing land is generally worthless except for the water which it contains, then the quantity that could be used on the land would be nominal, and injunctions could not be obtained, or substantial damages awarded, against those who carry it to distant lands. So far as the active interference of others is concerned, therefore, the danger to such undertakings is much less, and the incentive to development much greater, from the doctrine of reasonable use than from the contrary rule. No doubt there will be inconvenience from attacks on the title to waters appropriated for use on distant lands made by persons who claim the right to the reasonable use of such waters on their own lands. Similar difficulties have arisen and now exist with respect to rights in surface streams, and must always be expected to attend claims to rights in a substance so movable as water. But the courts can protect this particular species of property in water as effectually as water rights of any other description.

"It may, indeed, become necessary to make new applications of old principles to the new conditions; and in view of the novelty of the doctrine, and the scope of the

argument, it is not out of place to indicate to some extent how it should be done, although otherwise it would not be necessary to the decision of the case. The controversies arising will naturally divide into classes.

"There will be disputes between persons or corporations claiming rights to take such waters from the same strata or source for use on distant lands. There is no statute on this subject, as there now is concerning appropriations of surface streams, but the case is not without precedent. When the pioneers of 1849 reached this State, they found no laws in force governing rights to take waters from surface streams for use on non-riparian lands. Yet it was found that the principles of the common law, although not previously applied to such cases, could be adapted thereto, and were sufficient to define and protect such rights under the new conditions. The same condition existed with respect to rights to mine on public land, and a similar solution was found. The principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams will, in general, be found applicable to such appropriations of percolating waters, either for public or private use, and will suffice for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right. And in ordinary cases of this character the law of prescriptive titles and rights and the statute of limitations will apply.

"In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such land-owners: those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. Under the decision in this case the rights of the first class of land-owners are paramount to that of the one who takes the water to distant land; but the land-owner's right

extends only to the quantity of water that is necessary for use on his land, and the appropriator may take the surplus. As to those land-owners who begin the use after the appropriation, and who, in order to obtain the water must restrict, or restrain, the diversion to distant lands or places, it is perhaps best not to state a positive rule. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators.

"Disputes between overlying land-owners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times. The parties interested in the question are not before us.

"In addition there are some general rules to be applied. In cases involving any class of rights in such waters, preliminary injunctions must be granted, if at all, only upon the clearest showing that there is imminent danger of irreparable and substantial injury, and that the diversion complained of is the real cause. Where the complainant has stood by while the development was made for public use, and has suffered it to proceed at large expense to successful operation, having reasonable cause to believe it would affect his own water supply, the injunction should be refused and the party left to his action for such damages as he can prove. If a party makes no use of the water on his own land, or elsewhere, he should not be allowed to enjoin its use by another who draws it out, or intercepts it, or to whom it may go by percolation, although, perhaps, he may have the right to a decree settling his right to use it when necessary on his own land, if a proper case is made.

"The objection that this rule of correlative rights will throw upon the court a duty impossible of performance, that of apportioning an insufficient supply of water among

a large number of users, is largely conjectural. No doubt cases can be imagined where the task would be extremely difficult, but if the rule is the only just one, as we think has been shown, the difficulty in its application in extreme cases is not a sufficient reason for abandoning it and leaving property without any protection from the law.

"It does not necessarily follow that a rule for the government of rights in percolating water must also be followed as to underground seepages or percolations of mineral oil. Oil is not extracted for use in agriculture, or upon the land from which it is taken, but solely for sale as an article of merchandise, and for use in commerce and manufactures. The conditions under which oil is found and taken from the earth in this State are in no important particulars different from those present in other countries where it is produced. There is no necessary parallel between the conditions respecting the use and development of water and those affecting the production of oil. Whether in a contest between two oil producers concerning the drawing out by one of the oil from under the land of the other we should follow the rule adopted by the courts of other oil-producing States, or apply a rule better calculated to protect oil not actually developed, is a question not before us and which need not be considered." (Decided by the Supreme Court of California in the case of Katz vs. Walkinshaw, which decision is printed in Volume 26 of California Decisions, page 820.)

Section 1079.—WATER COMPANIES.—Water companies are incorporated under the general laws applying to corporations in California, to supply cities and towns with water. The law provides, however, that no corporation formed to supply any city and county, or city or town, with water must do so unless previously authorized by an ordinance, or unless it is done under a contract; that notwithstanding any such contract, the municipality shall retain the right to regulate the rate to be charged for

water; that no exclusive right shall be granted to any water company; and that no contract or franchise shall be made for a term exceeding fifty years.

Civil Code, Section 548.

(a)—Water in Case of Fire.—The means of extinguishing fires in a city or town, the fire apparatus and the fire company, are under the direction and control of the municipality. And a water company, as a condition of the privilege granted to it to supply the inhabitants with water, must supply the municipality with water to the extent of its means in case of fire, free of charge.

Civil Code, Section 545.

(b)—Water Rates.—The Board of Supervisors of a city and county, or the Board of Trustees of a city or town, are compelled to annually fix the rates to be charged and collected by any water company supplying water to the inhabitants or the municipality. The rates thus fixed hold good for one year.

General Laws of California, page 1268.

(c)—Duty to Furnish Water.—All corporations formed to supply water to cities or towns must furnish pure, fresh water to all the inhabitants for domestic purposes, so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor. If a water company refuses to supply an inhabitant of a town with water, upon demand and tender of the charge, the company may be compelled to do so, by a suit in the Superior Court.

Civil Code, Section 549.

(d)—Water Company Not Liable for Loss by Fire.—A very important decision was made by the Supreme Court of California, in February, 1904, the first case of the kind

in the United States. A fire occurred in the town of Ukiah, and at the time, through the negligence of the water company, there was not sufficient water in the mains to extinguish it, or to keep it from spreading. A part of the Town Hall and other city property was destroyed. The town sued the water company for damages. On appeal to the Supreme Court, the decision was in favor of the water company, the Court holding that where a water company furnishes water to a municipality for general fire purposes, it cannot be held liable for the value of property destroyed by fire, although the loss may be due to the negligence of the company. A water company is not an insurer against loss by fire. To be liable at all, in any event, for loss of property by fire, there would have to be an express contract between the owner and the company by which the latter agreed to pay for certain property, if destroyed by fire through its failure to supply water. A franchise to supply water for general fire purposes does not create such contract, and a water company is not liable in California for loss by fire. (Decided by the Supreme Court of California in the case of Town of Ukiah vs. Ukiah Water and Improvement Company, which decision is printed in Volume 27 of the California Decisions, page 353.)

(e)—Water Rates Must Be Reasonable.—The rates fixed annually must be reasonable, sufficient in amount to afford the water company a fair and just compensation for the services rendered by it in furnishing water to the city and its inhabitants. But in making an estimate of what will be a fair rate, the city cannot include interest on the company's indebtedness, nor the sum the plant will depreciate annually aside from the sum requisite for its maintenance and repair. (Decided by the Supreme Court of California in the case of Redlands Domestic Water Co. vs. City of Redlands, which decision is printed in Volume 121 of the California Reports, page 365.)

(f)—Damages for Failure to Supply Water.—In an action for the failure of a water company to furnish plaintiff with water, plaintiff cannot recover the profits he would have realized from crops that he would have raised had the water been furnished by defendant, less the cost of planting, etc., as such profits are too remote and speculative; but the proper damages are the difference between the rental value of the land with water and its rental value without it. (Decided by the Supreme Court of California in the case of Crow vs. San Joaquin Canal Co., which decision is printed in Volume 130 of the California Reports, page 309.)

(g)—Duty to Fix Reasonable Rates Can Be Compelled.—Where a city Board have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed water rates, without any reference to what they should be, without reference either to the expense necessary to furnish water or to what is a fair and reasonable compensation therefor, so as to render it impossible to furnish water without loss, and so low as to amount to a practical confiscation of the property invested in the business, it is within the jurisdiction of a court of equity to set aside such ordinance and direct the Board to fix fair and reasonable rates. (Decided by the Supreme Court of California in the case of Spring Valley Water Works vs. City and County of San Francisco, which decision is printed in Volume 82 of the California Reports, page 286.)

(h)—Pollution of Water.—The courts will interfere to prevent the pollution of the waters of a stream, from deposits of offensive matter. For instance, where there are lower riparian owners, one has no right to pollute the waters of a stream by maintaining a cow stable and hog pen on its banks, but must keep his stock at a reasonable distance away from the stream. (Decided by the Supreme Court of California in the case of People vs. Elk River

Mill Co., which decision is printed in Volume 107 of the California Reports, page 221.)

Section 1080.—CONDEMNATION OF WATER FOR PUBLIC USE.—The riparian owner's property in the water of a stream may be condemned for public use; as, to supply the inhabitants of a city or town. But upon any such condemnation, which is by a suit in the Superior Court, the judgment will direct the payment to the owner of the value of the water to him, and such damages as he may sustain from being deprived of the water. This is done as a compensation to him for the loss of his riparian rights. The amount of damages which will justly compensate for the taking of the water for public use will be determined in each case by a jury selected for the purpose.

Section 1080a.—ARTESIAN WELLS.—The Legislature of 1907 passed a law to prevent the waste of water from artesian wells. This law provides that any artesian well which is not capped, equipped, or furnished with such mechanical appliance as will readily and effectively prevent the flow of any water therefrom is to be deemed a public nuisance. The owner, tenant, or occupant of land upon which an artesian well is situated, who causes or permits a waste of water therefrom, is guilty of a misdemeanor. The water must not be allowed to run from the well into any river, creek, or other natural water course or channel, or into any bay or pond, or into street, road or highway, unless thereafter taken out and used for the beneficial purposes of irrigation of land or domestic use; and whenever water from an artesian well is used to irrigate land, not more than five per cent of it must be allowed to escape. The punishment for wasting water from an artesian well, or for failure to keep the well capped and protected, is by a fine of not less than $25 nor more than $500, or imprisonment in the county jail for a period of not more than six months, or both such fine and imprisonment.

Act of the Legislature, approved March 6, 1907.
Act of the Legislature, approved March 25, 1909.

Section 1080b.—FLOOD WATERS.—When usually recurring floods or freshets are accustomed to swell the banks of a river beyond the low water mark of dry seasons and overflow them, but such waters flow in a continuous body with the rest of the water in the stream and along well-defined boundaries, they constitute a single natural watercourse. It is immaterial that the boundaries of such stream vary with the seasons or that they do not consist of visible banks. It is only necessary that there be natural and accustomed limits to the channel. Water flowing under such circumstances as these, notwithstanding they may consist of a large expanse of water on either side of the main channel, constitute but a single watercourse, and riparian rights pertain to the whole of them. (Decided by the Supreme Court of California, in the case of Miller & Lux vs. Madera Canal and Irrigation Company, which decison is printed in Volume 34 of California Decisions, page 339.)

Sections 1081 to 1125, inclusive, "United States Homestead Laws," are omitted from the Eighth Edition.

PART IX

ADMINISTRATION OF ESTATES

Estates of Deceased Persons

Section 1126.—SETTLEMENT OF ESTATES.—Of interest to all is the subject of the administration and settlement of estates in the State of California. Under this head will be shown the various steps to be taken in the appointment of executors or administrators, the management of the property of an estate, the selling of property under orders of the Court, the rights of heirs and legatees, and the final settlement and distribution.

Section 1127—EXECUTORS AND ADMINISTRATORS.—An executor is appointed where there is a will, and is either appointed by the Court or named in the will.

An administrator is appointed by the Court where there is no will.

Authority to an executor is given by an appointment of the Superior Court, and called Letters Testamentary.

Authority to an administrator is given by the same Court, and called Letters of Administration.

Section 1128.—WHERE LETTERS WILL BE GRANTED.—Letters testamentary to an executor, or letters of administration to an administrator, must be granted, (1) in the county of which deceased was a resident at the time of his death, no matter where he died; or, (2) in the county in which he died, leaving property in that county, and not being a resident of the State; or, (3) in the county in which any part of his estate may be, when he dies out of this State and was not a resident here at the

time of his death; or, (4) in the county in which any part of the estate may be, the decedent not being a resident of the State, and not leaving estate in the county in which he died; or, (5) in all other cases, in the county where application for letters is first made.

When the estate of the decedent is in more than one county, he having died out of the State, and not having been a resident thereof at the time of his death, or being such non-resident, and dying within the State, and not leaving estate in the county where he died, the Superior Court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate.

Code of Civil Procedure, Sections 1294, 1295.

Section 1129.—PROOF OF WILL.—Any person having a will in his possession must produce and deliver it to the Superior Court, or the executor named in the will, within thirty days after he receives information that the maker is dead; and if he fails to do this he will be responsible for all damages sustained by any one thereby.

Code of Civil Procedure, Section 1298.

(a)—**Who May Petition for Probate of Will.**—Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the Superior Court to have the will proved.

Code of Civil Procedure, Section 1299.

(b)—**When Executor Forfeits Right to Letters.**—If the person named in a will as executor wilfully fails, for thirty days after he has knowledge of the death of the testator and that he is named as executor, to petition the proper court for the probate of the will, he will forfeit his rights as executor under the will.

Code of Civil Procedure, Section 1301.

(c)—**Executor May Decline to Act.**—An executor named in a will may decline to act, by filing a written notice that

he renounces his appointment and declines to act as such, at the same time that he files the will.

(d)—**Proof of Will.**—When a will is presented for probate, the Superior Court will hear the proofs and issue a certificate of probate. The persons who signed the will as witnesses are examined as to their knowledge of its execution, and to show that it is really the will of the testator.

When one of the witnesses to a will is examined, and the others are dead or insane, or their residence unknown, other testimony, of the handwriting of the testator, and other circumstances, will be taken sufficient to prove that the instrument produced is really the last will and testament of the deceased.

If all the witnesses to the will are dead, or insane, or not residing in the county, the Court will allow the will to be proved by other evidence—the handwriting of the testator, the surrounding circumstances, the handwriting of the subscribing witnesses, etc.

Code of Civil Procedure, Section 1315.

When a will is presented which is all in the handwriting of the testator, an olographic will, it will be proved by the testimony of persons who know his handwriting.

(e)—**Recording Will.**—The will and a certificate of the proof thereof must be filed and recorded by the clerk of the court.

Code of Civil Procedure, Section 1318.

(f)—**Proof of Lost or Destroyed Will.**—The Superior Court has power to take proof of a will, although the paper itself be lost or destroyed. But no will can be proved as a lost or destroyed will, unless the proof shows that the will was in existence at the time of the death of the testator, or was fraudulently or by public calamity destroyed in his life-time; provided, if the testator be committed to any state hospital for the insane, and after such commitment his will is destroyed by public calamity, and the testator is never restored to competency, then after his death the will may be probated as though it were in existence at the

time of his death. The provisions of a lost or destroyed will must be clearly and distinctly proved by at least two credible witnesses.

Code of Civil Procedure, Section 1339 (as amended March 6, 1907).

(g)—**Proof of Foreign Will.**—Wills probated in any other State or Territory of the United States, or in any foreign country or state, are admitted to probate in this State on the production of a copy and the original record of probate in another country.

Section 1130.—LETTERS TESTAMENTARY.—After probate of a will, letters testamentary will be granted to the persons therein named as executors. If there are two or more executors named in the will, and some decline to act, letters will be granted to those who remain.

Any person interested in a will may file objections in writing to the granting of letters testamentary to any of the persons named as executors, and the objections will be heard and determined by the court.

If the executor named in the will be a minor or absent from the State, letters will be granted to some other person, who will hold the trust until the executor named in the will becomes of age or returns to the State. If two executors are named in the will, and one of them is a minor or absent from the State, the one who can qualify will act as executor alone until such time as the other becomes of age or returns to the State. The latter will then have the right to act as joint executor.

Code of Civil Procedure, Sections 1349, 1354, 1355.

(a)—**Revocation of Letters.**—If an executor or administrator becomes of unsound mind, or is convicted of felony or infamous crime, or becomes a habitual drunkard, or mismanages or wastes the estate, he will be removed by the Superior Court and another will be appointed in his place.

(b)—**Married Woman or Corporation May Act.**—A married woman may act as executrix of a will, or as administratrix of an estate.

A corporation may act as executor or administrator, if authorized by its articles of incorporation so to do.

Code of Civil Procedure, Sections 1348, 1350, 1352.

Section 1131.—LETTERS OF ADMINISTRATION.—If a person dies without making a will, the Superior Court will grant letters of administration of his estate. If a person dies leaving a will, but the will does not name any executor, the court will appoint an administrator, called an "administrator with the will annexed," who will have power to carry out the provisions of the will in the same manner as he would if named in the will.

(a)—**Who Are Entitled to Letters of Administration.**—The persons entitled to letters of administration are as follows:

(1) The surviving husband or wife, or some competent person whom he or she may request to have appointed;

(2) The children;

(3) The father and mother;

(4) The brothers;

(5) The sisters;

(6) The grandchildren;

(7) The next of kin entitled to share in the distribution of the estate;

(8) The public administrator;

(9) The creditors;

(10) Any person legally competent.

If the deceased was a member of a partnership at the time of his death, the surviving partner cannot be appointed administrator of the estate.

Act of the Legislature, in effect May 18, 1907.

Section 1132.—WHO ARE INCOMPETENT TO ACT AS EXECUTOR OR ADMINISTRATOR.—A person

may be entitled to letters of administration, as provided in the preceding section, and at the same time be incompetent for personal reasons. For the law provides that in the following cases the persons otherwise entitled must not be appointed: (1) When the person is under the age of majority; or, (2) has been convicted of an infamous crime; or, (3) when he is adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

Code of Civil Procedure, Section 1369; Code of Civil Procedure, Section 1350 (as amended March 16, 1907).

Section 1133.—OATH OF EXECUTOR OR ADMINISTRATOR.—The executor or administrator must take and subscribe an oath, that he will perform, according to law, the duties of his trust. This oath is in writing and is recorded by the clerk of the court with the letters of administration.

Code of Civil Procedure, Section 1387.

Section 1134.—BOND OF EXECUTOR OR ADMINISTRATOR.—Executors or administrators in the State of California must give a bond, for the faithful discharge of their duties, in an amount equal to twice the value of the personal property belonging to the estate, and twice the probable value of the rents, profits, and issues of the real property. The court ascertains these values by examining on oath the party applying for letters, or any other person. The bond must be signed by two or more sureties, to be approved by the judge of the court.

Code of Civil Procedure, Section 1388.

An additional bond must be given whenever the sale of any real estate is to be made by order of the court; but no additional bond is necessary when it appears that the amount of the bond already given is twice the value of the personal property remaining in or that may come into the

possession of the executor or administrator (including the annual rents, profits, and issues of the real estate), and twice the probable amount to be realized on the sale of the real estate ordered to be sold.

Code of Civil Procedure, Section 1389.

Section 1135.—SEPARATE BONDS.—When two or more persons are appointed executors or administrators, the Court must require and take a separate bond from each of them.

Code of Civil Procedure, Section 1391.

Section 1136.—WHEN EXECUTOR MAY ACT WITHOUT BONDS.—A will may expressly provide that the executor named in it shall act without giving bonds. Where a will does so provide, the executor will have power to administer the estate, including the sale of property, without giving any bonds whatever. If the estate is not managed properly, however, the Court has power to demand a bond of the executor, even where the will declares that no bond shall be given. It is the duty of the Court, no matter what the provisions of the will may be, to see that the estate is properly managed, without waste or unnecessary or wilful losses.

Code of Civil Procedure, Section 1396.

Section 1137.—SPECIAL ADMINISTRATOR.—When there is delay in application for or the granting of letters to an executor or administrator, or when no sufficient bond is filed, or when an executor or administrator dies or is suspended or removed, the Court may appoint a special administrator, to act for the time being, and whose duty it shall be to take charge of and preserve the estate until such time as a regular executor or administrator shall be appointed and qualified to act. The special administrator must give a bond in the same manner as other administrators.

Code of Civil Procedure, Section 1411.

Section 1138.—RELEASE OF BONDSMEN.—The bondsmen of an executor or administrator may be released by the court. When a surety of any executor or administrator desires to be released from the bond, and from future responsibility, he must make an application therefor to the Superior Court. The court will then require the executor or administrator to appear and give a bond with new sureties, and if he neglects to do so his letters will be revoked, and a new executor or administrator appointed. If new sureties are given to the satisfaction of the judge, the surety who applied for release will not be liable on the bond for any subsequent act, default, or misconduct of the executor or administrator.

Code of Civil Procedure, Sections 1403, 1404, 1405.

Section 1139.—RESIGNATION OF EXECUTOR OR ADMINISTRATOR.—An executor or administrator may resign if he wishes to do so. He may do this by filing in the Superior Court a written notice that he resigns his appointment. But, before his resignation can be accepted by the court he must file his accounts and have them allowed and settled by the court. The court can then make an order allowing and accepting the resignation.

If there are a number of executors or administrators, and one of them resigns, it will be the duty of those who remain to administer and settle up the estate.

Code of Civil Procedure, Section 1427.

Section 1140.—SUIT AGAINST BONDSMEN.—If the letters of an executor or administrator are revoked, or if he resigns or dies, and it is discovered that he has been faithless to his trust, any person injured by his bad conduct may bring a suit against his bondsmen to make good the losses sustained.

Section 1141.—INVENTORY AND APPRAISEMENT.—As soon as an executor or administrator has qualified. he is entitled to the immediate possession of the real

estate and personal property of the deceased. He may receive the rents and profits of the real estate, until the estate is settled. And, as he has possession and charge of the estate, the law requires him to show to the court what property the estate consists of, and its location and condition. This he does by having an inventory and appraisement made, which is filed with the court. The inventory is made by the executor or administrator, under oath, containing a true statement of the real and personal estate of the deceased which has come to his possession or knowledge, and must be made and filed within three months after his appointment. Attached to the inventory must be an appraisement of the value of the property by at least two disinterested persons, appointed by the court. The court must appoint three appraisers, but it is sufficient if two of them act. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned by the executor or administrator, as in other cases. If the estate is less than $1,500 in value, only one appraiser will be appointed.

Act of the Legislature, approved April 21, 1909.

(a)—**Compensation of Appraiser.**—The appraisers are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court.

(b)—**When Additional Inventory Required.**—Whenever property not mentioned in the first inventory comes to the possession or knowledge of the executor or administrator, he must make and file another inventory and appraisement covering such property.

Code of Civil Procedure, Sections 1443, 1444, 1446, 1451.

Section 1142.—MONEY IN BANK.—The surviving husband or wife of any deceased person, or, if no husband or wife is living, then the children of such decedent, may,

without procuring letters of administration, collect of any bank any sum which the deceased may have left on deposit in such bank at the time of his or her death; provided, such deposit does not exceed the sum of $500. An affidavit must be made that the whole amount left on deposit by decedent in any and all banks did not exceed the sum of $500.

Act of the Legislature, in effect May 16, 1907.

Section 1143.—PROBATE HOMESTEAD AND FAMILY ALLOWANCE.—The court will set aside a homestead for the use of the widow and children, whether there was a homestead during the life of the decedent or not. This homestead will be set aside out of the community property, if there be any, or out of the separate property of the deceased, if there is no community property. The homestead will be exempt from all claims against the estate, whether individual debts of the deceased, or community debts. The homestead is for the use and support of the widow, child, or children, of the deceased, and is not an asset of the estate for the payment of debts.

When a homestead is set apart to the use of the family, the property, with one exception stated below, is the property of the surviving widow, if there is no minor child. If the decedent left also a minor child or children, the one half of such homestead belongs to the widow, and the remainder to the child, or in equal shares to the children, if there are more than one. If there is no wife surviving, the whole property belongs to the minor child or children. If the property set apart is a homestead selected from the separate property of the decedent, the court can set it apart only for a limited period, and, subject to such homestead right, the title vests in the heirs of the deceased. If, for instance, a man dies leaving a wife and minor children, and the court sets apart a homestead from the separate property of the deceased for the use of the family, for a period of five years; upon the expiration of the term of five years, limited by the court as the life of the homstead, the property will be

distributed by order of the court, one third to the widow, and two thirds to the children. The title to the property vests in the heirs on the death of the person from whose property the homestead was selected.

(a)—**Exempt Property.**—In addition to the homestead, the law provides that the court must set apart for the use of the family all the property of the estate which is by law exempt from execution.

(b)—**Extra Allowance.**—If the amount set apart be insufficient for the support of the widow and minor children, the court will make such further reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate. Any such allowance made by the court must be paid by the executor or administrator in preference to all other charges, except funeral charges, and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court, take effect from the death of the decedent.

Code of Civil Procedure, Sections 1465, 1466, 1467, 1468.

Section 1144.—ADMINISTRATION WHEN ESTATE DOES NOT EXCEED FIFTEEN HUNDRED DOLLARS.—If it appears from the inventory that the value of the whole estate does not exceed the sum of fifteen hundred dollars, the court must make an order assigning to the widow of the deceased, or if there be no widow then to the minor children, the whole of the estate. And the title to the property will vest absolutely in such widow or minor children, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration. The property will still be subject, however, to whatever mortgages, liens, or incumbrances there may have been upon it at the time of the death of the deceased. After property worth not more than fifteen hundred dollars is assigned by the court as above stated, there

can be no further proceedings in the administration, unless other property is afterwards discovered.

Code of Civil Procedure, Section 1469.

Section 1145.—CLAIMS AGAINST THE ESTATE.—After property has been appropriated from the estate for the support of the widow or minor children, as provided by law, the claims of creditors are to be next considered.

(a)—**Notice to Creditors.**—Every executor or administrator must publish a notice to creditors, immediately after his appointment, requiring all persons having claims against the decedent to present them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. The notice to creditors must be published in some newspaper in the county, if there is one, or if not, then in a newspaper designated by the court. The notice must be published as often as the court deems necessary, but not less than once a week for four successive weeks. The time expressed in the notice, within which claims against the estate shall be presented, must be ten months after its first publication, when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not exceed the sum of ten thousand dollars.

(b)—**Claims Barred if not Presented in Time.**—All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the executor or administrator within the time limited in the legal notice to creditors, and any claim not so presented is barred forever. But, when it is made to appear to the satisfaction of the court by the affidavit of the creditor, that the creditor was out of the State when the notice was published, the claim may be presented at any time before a decree of distribution is entered.

(c)—**Claims Must be Verified.**—Every claim presented to the administrator or executor must be sworn to by the claimant or some one on his behalf, who must make affidavit

that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the claim within the knowledge of the affiant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers to be produced in support of the claim.

(d)—**Allowance and Rejection of Claims.** — When a claim has been presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date. If he allows the claim, it must be presented to the judge of the court, who must in the same manner indorse on it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, will be prima facie evidence of such presentation and the date thereof.

If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, it will be presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

Every claim which has been allowed by the executor or administrator and the judge must be filed in the court, within thirty days thereafter, and will then rank among the acknowledged debts of the estate, to be paid in due course of administration.

(e)—**Suit on Rejected Claim.**—If a claim is rejected by the executor or administrator or by the court, the holder must bring suit against the executor or administrator within three months after written notice of its rejection, if the claim be then due, or within two months after it becomes

due. If he does not bring suit within such time, the claim will be barred forever.

(f)—**Claim When Suit Pending.**—If a suit is pending against a person at the time of his death, the claim must be presented to the administrator or executor, the same as if no suit had been commenced. If the claim is not so presented, no recovery can be had in the suit.

(g)—**Payment of Judgments.**—When any judgment has been rendered against a person in his lifetime, no execution can be issued on the judgment after his death, but it must be presented to the executor or administrator in the same manner as any other claim; and, if justly due and unsatisfied, it must be paid in due course of administration.

(h)—**Allowance of Claim in Part.**—Whenever any claim is presented to an executor or administrator or to a judge, and he is willing to allow the claim in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuses to accept the amount allowed in satisfaction of his claim, and sue upon it, he will not be allowed any costs unless he recovers a greater amount.

(i)—**Statute of Limitations.**—No claim can be allowed by the executor or administrator, or by a judge of the Superior Court, which is barred by the statute of limitations.

No claim against any estate, which has been presented and allowed, is affected by the statute of limitations pending the proceedings for the settlement of the estate.

(j)—**Claim of Executor or Administrator.**—If the executor or administrator is himself a creditor, his claim, duly authenticated by affidavit, must be presented for allowance or rejection to the judge of the court. The judge may allow or reject the claim. Its allowance by the judge is sufficient evidence of its correctness. If the claim of an executor or administrator is rejected by the judge, he

may sue the estate, and summons in the suit can be served upon the judge.

(k)—**Failure to Present Mortgage Claim.**—If a mortgagee fails to present his claim against the estate to the executor or administrator, within the time required by law, he will not altogether lose his debt. He may still sue upon the mortgage, because it was a lien upon the property of the deceased during his lifetime. But, not having presented his claim as required by law, he must look only to the property of the estate covered by his mortgage for the collection of the amount due him. He will get it all, if the property will sell for enough to pay it. But if the money cannot be got out of the mortgaged property, by failure to present the mortgage claim he loses the right to have other property of the estate applied to the payment of the deficiency. Where a mortgage claim is not presented against the estate, the debt must be collected out of the mortgaged property, or not at all; and no attorney fees can be recovered upon such a claim not presented, even though the mortgage may have provided for attorney fees.

Code of Civil Procedure, Sections 1490, 1491, 1493, 1494, 1496, 1497, 1498, 1499, 1500, 1502, 1503, 1505

Section 1146.—SALE OR MORTGAGE OF PROPERTY.—No sale or mortgage of any property of an estate is valid unless made under order of the court.

(a)—**Sale of Personal Property.**—At any time after receiving letters the executor or administrator may apply to the court for an order to sell the perishable property of the estate, and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the family allowance.

If claims against the estate have been allowed, or money is necessary for the payment of the expenses of administration, or to pay legacies, the court may make an order

to sell so much of the personal property as may be necessary. Partnership interests may also be ordered sold, when it appears to be for the best interest of the estate.

Sales of personal property must be made at public auction, unless the court expressly orders a private sale. Sales of personal property can only be had after notice given of at least ten days, by posting notices in three public places in the county, or by publication in a newspaper.

(b)—**Sale or Mortgage of Real Property.**—When the personal estate in the hands of the executor or administrator is insufficient to pay the family allowance, and the debts and charges of administration, or the claims outstanding against the decedent, or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interest of the estate and those interested therein, that the real estate or some part thereof be sold; the executor or administrator may sell any real as well as personal property of the estate, upon the order of the court. The court may order all or a part of the real estate sold.

The land may be mortgaged, instead of being sold, if the court shall be satisfied that a mortgage will be best for the estate and for all concerned.

If a sale be ordered, it may be either for cash, or on credit not exceeding one year.

The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs.

The sale of real estate may be at public auction, or at private sale, as the court may direct.

Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties, it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day.

If the sale is at private sale, bids must be presented to the executor or administrator in writing, or the bids may

be filed in the office of the clerk of the court. Notice of receiving bids must be given as directed by the court.

(c)—**Confirmation of Sale.**—The sale of real estate must be confirmed by the Superior Court. The executor or administrator must make a report to the court after the sale, and if the court is of the opinion that the proceedings were unfair, or that the property was sold for less than its value, and that a new offer exceeding the selling price at least ten per cent, exclusive of expenses of a new sale, may be obtained, the court will refuse to confirm the sale, and will order another sale. On the contrary, if it appears to the court that the sale was legally made and fairly conducted, and that ten per cent more cannot be obtained, an order will be made confirming the sale and directing conveyances to be executed; and such sale from that time becomes confirmed and valid. But even if the sale was not fair, and was made for less than the value of the property, the court is not absolutely required to order another sale; for if an offer of ten per cent more in amount than that named in the return of the first sale be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, without ordering a new sale.

Code of Civil Procedure, Sections 1536, 1542, 1544, 1547, 1548, 1549, 1552, 1554.

Section 1147.—SALE UNDER A WILL.—When property is directed by will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the court, and either by public or private sale, and with or without notice; but the executor must make a return to the court of such sales, as in other cases; and if directions are made in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale is confirmed by the court.

Code of Civil Procedure, Section 1561.

Section 1148.—COMPENSATION OF EXECUTORS AND ADMINISTRATORS.—The law allows an executor or administrator commissions on the whole estate accounted for by him as follows: For the first thousand dollars, at the rate of 7 per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; for the next fifty thousand dollars, at the rate of one per cent; and for all above one hundred thousand dollars, at the rate of one-half of one per cent.

Section 1149.—ATTORNEY FEES.—Executors and administrators must be allowed, for fees of their attorneys, for conducting the ordinary probate proceedings, the same amounts specified in the preceding sections as commissions for their own services.

In all cases, such further allowance may be made as the court may deem just and reasonable, for any extraordinary service, such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as it may become necessary for the executor or administrator to prosecute or defend.

Code of Civil Procedure, Section 1619.

Section 1150.—ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.—When required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render an account under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. Objections may be made to the correctness of the account, by any person interested, which the court will hear and determine.

Code of Civil Procedure, Section 1622 (as amended March 29, 1907.)

Section 1151.—PAYMENT OF DEBTS.—The debts of the estate must be paid in the following order:

1. Funeral expenses;
2. Expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his life time, and mortgages and other liens in the order of their date;
5. All other demands against the estate.

The preference given to a mortgage or lien only extends to the proceeds of the property subject to the mortgage or lien.

Code of Civil Procedure, Sections 1643, 1644.

Section 1152.—ERECTION OF MONUMENT.—Executors and administrators of the estates of deceased persons have authority to expend a reasonable sum out of the estate to erect a monument, or tombstone, suitable to mark the grave of the deceased.

Section 1153.—PARTIAL DISTRIBUTION OF ESTATE.—At any time after four months from the issuing of letters to an executor or administrator any heir, devisee, or legatee may apply to the Superior Court for the legacy or share of the estate to which he is entitled. If, on the hearing of the application, it appears to the court that the estate is but little in debt, and that the share of the party applying may be allowed him without injury to the creditors of the estate, the court must order the executor or administrator to deliver to him the whole portion of the estate to which he may be entitled, or a part of it; provided, he must give the executor or administrator a bond, to secure the payment of his portion of the debts due from the estate.

Act of the Legislature, in effect May 23, 1907.

Section 1154.—FINAL DISTRIBUTION OF ESTATE.—Upon the settlement of the final account of an executor or administrator, or at any subsequent time, he may apply to the court for a final distribution of the estate, and the court will then proceed to distribute what remains of the estate among the persons who are by law entitled to it.

Code of Civil Procedure, Section 1665.

Section 1155.—SUCCESSION TO PROPERTY.—If a person dies, leaving a will, his property goes to the persons named therein as legatees. Who may make a will, who may take by will, and what may be disposed of by will, has been discussed under the heading "Last Wills and Testaments." We now consider how the property of a person who dies, leaving no will, will descend upon his death, and to whom it will go in succession as his heirs at law.

The Code defines the term succession, as the coming in of another to take the property of one who dies without disposing of it by will. The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by the court for the purposes of administration. When a person dies without disposing of his property by will, it is succeeded to and must be distributed, subject to the payment of his debts in the following manner:

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there

is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or the child living and the issue of the deceased child or children by right of representation;

2. If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other;

3. If there is neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children nor grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim

through the nearest ancestor must be preferred to those claiming through an ancestor more remote;

6. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to

such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation.

9. If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof, under subdivisions eight of this section, the same escheats to the State for the support of the common schools.

Act of the Legislature, in effect May 18, 1907.

(a)—**Inheritance of Husband and Wife from Each Other.**—The above provisions of this Section, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedent.

(b)—**Distribution of Community Property on Death of Husband.**—Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants equally, if such descendants are in the same degree of kindred to the deceased, otherwise according to the right of representation; and in the absence of both such testamentary disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

(c)—**Distribution of Community Property on Death of Wife.**—Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband. If any portion of the community property has

been set apart for the wife by judicial decree, for her support and maintenance, this portion does not go to her husband upon her death, but may be willed away by her; and in the absence of her testamentary disposition, it will go to her heirs, exclusive of her husband.

Civil Code, Sections 1400, 1401, 1402.

Section 1156.—RIGHTS OF ILLEGITIMATE CHILD.—Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child. An illegitimate child is in all cases the heir of his mother, whether the father acknowledges him or not. An illegitimate child cannot claim any part of the estate of any deceased children or other heirs of his father or mother, unless his parents marry, and his father after such marriage acknowledges him and adopts him into his family.

Civil Code, Section 1387.

Section 1157.—ADVANCEMENTS.—Any estate, real or personal, that may have been given by the decedent in his lifetime as an advancement to any child or other heir, is considered a part of the estate, so far as regards its division and distribution, and must be taken by the person receiving it toward his share of the estate. If the amount of the advancement exceeds the share of the heir, he will be excluded from any further portion in the division and distribution of the estate, but he will not be required to refund any part of his advancement. If the amount advanced be less than his share, he will be entitled to so much more as will give him his full share of the estate. All gifts and grants are deemed to have been made as an advancement, if expressed in the gift or grant to be so made, or if charged in writing by the deceased as an advancement, or acknowledged in writing as such by the child or other heir.

Civil Code, Sections 1395, 1396, 1397.

Section 1158.—CONTRACT TO CONVEY REAL ESTATE.—If any person, who is bound by a contract in writing to convey any real property, dies before making the conveyance, the Superior Court may make a decree authorizing his executor or administrator to make a deed of the land to the person entitled thereto. The person entitled to the deed has the right to file a petition in court showing the contract, and will then be allowed to prove it. If he proves his right to the deed, it will be made to him by order of the court, and will convey the same title which a deed signed by the deceased would have conveyed if made in his lifetime.

Section 1159.—DISCHARGE OF ADMINISTRATOR OR EXECUTOR.—When the estate has been fully administered upon, and it is shown, by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up under order of the court all property of the estate to the persons entitled thereto, the court will make a decree discharging him from all liability to be incurred thereafter.

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